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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a municipality, pursuant to a general grant of authority from a state to operate an airport, may refuse to permit an air carrier to use the airport and those facilities required for its operation as an air carrier?

2. Whether an air carrier may privately enforce violations of the federal aviation laws where such violations amount to improper discriminatory treatment?

3. Whether local government antitrust immunity from injunction can be predicated on a state statute which while expressive of competitive displacement is nonetheless violative of federal laws?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Montauk-Caribbean Airways, Inc., d/b/a Long Island Airlines,[1] and the respondents Judith Hope, Randall Parsons, Anthony Bullock, Michael J. Finazzo, and Hugh King, Individually and as the Town Board of the Town of East Hampton, New York, Charles T. Smith, Russell Stein, East Hampton Aire, Inc., and Frank LaVigna.

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[1]Petitioner Montauk-Caribbean Airways, Inc., d/b/a Long Island Airlines, is privately owned by A. R. Landsman who holds 50% of the stock and Budd Levinson who holds 50% of the stock and has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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IN THE

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OCTOBER TERM, 1985

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as The Town Board of the Town of East Hampton, CHARLES T. SMITH, RUSSELL STEIN, EAST HAMPTON AIRE, INC., and FRANK LAVIGNA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Montauk-Caribbean Airways, Inc., d/b/a Long Island Airlines, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on February 14, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 784 F.2d 91, and is reprinted in Appendix D hereto.

The memorandum decisions of the United States District Court for the Eastern District of New York (Bramwell, D.J.) have not been reported. They are reprinted in Appendices B and C hereto.

JURISDICTION

Invoking federal jurisdiction and alleging violations of 15 U.S.C. §§ 1, 2, 15 and 26, the Federal Aviation Act, 49 U.S.C. §§ 1305, 1349(a), 2210(a), the Civil Rights law, 42 U.S.C. § 1983, the petitioner brought this suit in the Eastern District of New York. On May 28, 1985, the Eastern District granted motions of the Town defendants to dismiss the complaint for failure to state a claim, but left open the petitioner's Sherman Act claims. On September 4, 1985, the Eastern District granted the Town defendants' motion to reargue and dismissed the complaint.

On petitioner's appeal, the Second Circuit on February 14, 1986, entered a judgment affirming the Eastern District's orders. A petition for rehearing was sought and denied by order of March 27, 1986.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are 49 U.S.C. 1305, 49 U.S.C. § 2210 and 42 U.S.C. § 1983, copies of which are reproduced at Appendix I.

STATEMENT OF THE CASE

This case concerns the attempt of a municipality to restrict and control scheduled commercial airline services in violation of the Constitution and federal statutes.

Montauk-Caribbean Airways, Inc., d/b/a Long Island Airlines ("MCA") is a New York corporation engaged in the business of a commercial air carrier. Since the early 1960s, it has so operated out of the East Hampton, New York Airport. Up until 1978 it also operated as the sole fixed base operator ("FBO") from that airport.

An FBO is an entity which provides services for aircraft, including fuel, maintenance, tie downs, parking and so forth. *Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F. Supp. 543 (M.D.N.C. 1979). An air carrier by contrast, provides passenger transportation, ticketing for such passengers, and requires the services of an FBO to accomplish these activities. While totally distinct, an air carrier cannot operate without an FBO.

In 1978 defendant East Hampton Aire, Inc. ("EHA") also began acting as an air carrier and FBO at the East Hampton Airport. In 1979 MCA entered into a new lease with the Town which relieved MCA of its prior obligation of providing FBO services on a daily basis for twelve months of the year. The lease provided instead that MCA would be required to furnish FBO services "every day of each year except for the period from October 1 to April 30 of each year."

Even though MCA was relieved of *having* to provide FBO services for seven months of the year, MCA

contends that it is still *entitled* to operate as an air carrier and FBO from the airport on a year-round basis as it had done for the previous years. Put differently, the new lease did no more than specify a guaranteed minimum period for FBO services by MCA; it did not exclude FBO services—much less air carrier services—for the entire year. Even so, the Town Board has prohibited MCA from operating on a year-round basis. Only EHA is permitted by the Town to use the facilities necessary for support services year round.

The dispute between MCA and the Town has intensified since 1982 with the result that MCA was advised in October of 1984 that it was in violation of the terms of its lease and ordered to cease all operations. Thereafter, MCA filed a complaint with the Federal Aviation Administration ("FAA") alleging that the Town of East Hampton had discriminated against it. In 1985, after an informal investigation, the FAA found in favor of MCA, but the Town has taken no action.

In November 1985 the Town changed its position and conceded MCA's right to fly in and out of the East Hampton airport. (Until then MCA was prohibited by the Town from flying into East Hampton for more than five months a year.) Notwithstanding, the Town continued to refuse to permit MCA to support its business by the use of facilities for on-ground services such as ticketing, aircraft tie-downs, fueling and so forth.[2] The overall result of denying MCA these

[2] The Town's refusal was temporarily enjoined by the Second Circuit. The injunction was dissolved on February 14, 1986 and the Town is again trying to prohibit MCA's use of the airport facilities necessary for passenger services.

facilities would be the destruction of MCA as an air carrier at East Hampton. MCA cannot solicit and encourage business without direct contact with its passengers at the East Hampton airport. If MCA's passengers have to purchase tickets, deliver and receive their baggage, and accept other services from EHA—MCA's sole competitor at East Hampton—and MCA must depend on EHA for its aircraft fuel, then MCA will be totally and completely precluded from operating as an air carrier at East Hampton.

As a direct result of the earlier prohibition against year-round flying into East Hampton, MCA's share of the passenger travel shrunk from forty-four percent in 1980 to eleven percent in 1984. The Town's refusal to permit MCA to use the necessary facilities to service its passengers at East Hampton will further severely and irreparably harm MCA. All of this activity inures to the sole benefit of EHA, the only other carrier servicing the Town of East Hampton. The ultimate result is that the air carriers which compete for passenger business into and out of East Hampton, New York are determined not by market forces—as required by deregulation—but by the Town Board of East Hampton.

REASONS FOR GRANTING THE WRIT

I. The Federal Aviation Laws Prevent A Municipality, Acting Pursuant To A General Grant Of State Authority, From Refusing A Carrier Landing Rights And The Furnishing Of Services Incidental To Those Rights

The Second Circuit sustained the Eastern District's dismissal of the Complaint[3] on the grounds that while

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[3] Pursuant to FED. R. CIV. P. 12(b)6.

the Federal Aviation Laws may provide protection to MCA, MCA privately could not assert those rights. This holding was erroneous for several reasons. Moreover, if the decision is permitted to stand, it effectively will create a Civil Aeronautics Board at every municipal airport in the country from which there is no administrative or judicial review. Clearly that was not the intent of Congress.

Section 511(a) of the Airport and Airway Improvement Act of 1982 ("AIP") provides that:

> [I]n a project grant application submitted under this Title, the Secretary should receive assurances, in writing, satisfactory to the Secretary, that—
>
> (1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination, including the requirement that (A) each air carrier using such airport . . . shall be subject to such nondiscriminatory and substantially comparable rates, fees, rentals, and other charges in such nondiscriminatory and substantially comparable rules, regulations, and conditions, as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities. . . .
>
> (2) there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. . . .

49 U.S.C. § 2210(a).

The predecessor to § 2210(a), 49 U.S.C. § 1718 (originally enacted in 1970), was amended in 1976 to

specifically include air carriers and fixed-base operators. The statute identifies air carriers as among the class Congress intended to benefit by passage of the Act. *New York Airlines, Inc. v. Dukes County,* 623 F. Supp. 1435, 1446 (D.C. Mass. 1985); cf. *Stepanischen v. Merchants Despatch Transportation Corp.,* 722 F.2d 922 (1st Cir. 1983). *But see Hill Aircraft Leasing v. Fulton County,* 561 F.Supp. 667 (N.D. Ga. 1982), *aff'd without opinion,* 729 F.2d 1967 (11th Cir. 1984); *Guthrie v. Genessee County, New York,* 494 F.Supp. 950 (W.D.N.Y. 1980).

The legislative history of 49 U.S.C. § 1718 provides that Congress intended to recognize "the legitimate interest of air carriers and fixed-based operators in development at airports." H.R. Rep. No. 94-594, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 1600, 1614; *New York Airlines,* 623 F. Supp. at 1446.

The amendments to § 1718 were intended to require airport sponsors to "accord . . . rights of consultation" to air carriers in making decisions to undertake airport development. Further, the section as amended prohibited sponsors [here the Town] from charging discriminatory rates, fees, rentals and other charges which "make the same or similar uses of such airport utilizing the same or similar facilities." *Id. See discussion in New York Airlines,* 623 F. Supp. at 1447.

As Judge Wolf concluded in *New York Airlines:*

> Although the specific concern of Congress was with discrimination against supplemental carriers, the language adopted in the amendment [to § 1718] comprehensively includes all air carriers using the airport. The legislative

> history therefore indicates that Congress in enacting the statute intended to benefit air carriers by imposing the requirement on airport operators that carriers be subject to nondiscriminatory and substantially comparable treatment.

623 F. Supp. at 1447.

Importantly, 49 U.S.C. § 2210(a) uses mandatory language in its proscriptions. Airport operators are *required* to insure that the airport "will be available for public use on fair and reasonable terms and without unjust discrimination. . . ." 49 U.S.C. § 2210(a)(1). Further, the statute specifically provides that "there will be no exclusive right" for the use of an airport. 49 U.S.C. § 2210(a)(2).

This language describes far more than a Congressional preference; rather, it expresses a Congressional intent to bar exclusive rights to the use of airport facilities absent extraordinary circumstances. *New York Airlines,* 623 F. Supp. at 1447. *Accord: City of Dallas v. Southwest Airlines Co.,* 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd,* 494 F.2d 773 (5th Cir. 1974), *cert. denied,* 419 U.S. 1079 (1974), *reh'g denied,* 420 U.S. 913 (1975); *City of Pompano Beach v. FAA,* 774 F.2d 1529 (11th Cir. 1985); *Niswonger v. American Aviation, Inc.,* 411 F. Supp. 769 (E.D. Tenn.), *aff'd* 529 F.2d 526 (6th Cir. 1975). Yet here, as a result of the two decisions of the lower courts, MCA has been denied even an *opportunity* to require the Town to show such extraordinary circumstances.[4]

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[4] MCA's case was dismissed on a Rule 12(b)6 motion for failure to state a claim. Such motions should not be granted unless it

Here, exclusive rights to the airport—by denying MCA use of the facilities necessary for its support services— have in effect been granted EHA to the detriment of MCA. It is clear that 49 U.S.C. § 2210 bars the activities engaged in by the Town. Despite the plain intent of Congress—and the clear supremacy of the federal law over state, much less municipal, regulations—MCA remains excluded from East Hampton Airport without even having had its day in court.

II. Protection Against Non-Discrimination Provided By The Federal Aviation Laws May Be Privately Enforced By An Air Carrier

A. MCA May Sustain a Claim Pursuant to 42 U.S.C. § 1983.

The District Court and the Second Circuit both held that MCA could not sustain its cause of action for violations of § 2210 pursuant to 42 U.S.C. § 1983. Those rulings were in error.

In *Maine v. Thiboutot,* 448 U.S. 1 (1980), this Court held that §1983 "broadly encompasses violations of federal statutory as well as constitutional law." 448 U.S. at 4. Following *Thiboutot,* this Court defined only two types of circumstances in which a § 1983 remedy is not available:

> (i) whether Congress [intended to prohibit] private enforcement of [a] statute in the enactment itself, and

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appears to be a certainty that the plaintiff would not be entitled to recover under any state of facts which could be proved in support of his claim. *Conley v. Gibson,* 355 U.S. 41 (1957); *Cook & Nichol, Inc. v. Plimsoll Club,* 451 F.2d 505 (5th Cir. 1971).

> (ii) whether the statute at issue [is] the kind that create[s] enforceable "rights" under § 1983.

Middlesex County Sewage Auth. v. National Seaclammers Ass'n., 453 U.S. 1, 19 (1981); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981), *rev'd on other grounds*, 465 U.S. 89 (1984). The Second Circuit relied upon these decisions in finding that "the comprehensive enforcement scheme provided in the Federal Aviation Act manifests Congressional intent to foreclose an action under § 1983." *See* Appendix D. That decision is simply incorrect and contrary to the Second Circuit's own decision in *Beckham v. New York City Housing Authority*, 755 F.2d 1074 (2d Cir. 1985).

The analysis to be applied in making a determination as to whether a § 1983 action is available is similar to the analysis relating to implied rights of action because in both a party must demonstrate the existence of a federal right which may be judicially enforced. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377-78 (1982); *New York Airlines, Inc.*, 623 F. Supp. at 1444. The ultimate test is one of determining legislative intent. *See Curran*, 456 U.S. at 377-78; *Touche & Ross Co. v. Reddington*, 442 U.S. 560, 575-76 (1979); *New York Airlines*, 623 F. Supp. at 1445.

MCA does not dispute that § 1983 is a remedial statute that does not itself give rise to any substantive rights. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). A plaintiff must show that the statute violated is one that confers a federal right. Whether this Court applies a test requiring that a plaintiff demonstrate it is "an intended beneficiary"

of the program, *Balf Co., Inc. v. Gaitor,* 534 F. Supp. 600, 605 (D. Conn. 1982), *aff'd,* 709 F.2d 1235 (9th Cir. 1983), *vacated on other grounds,* 465 U.S. 1095 (1984), or that the plaintiff must show a benefit similar to that required to establish a private right of action, *Boatowners and Tenants Ass'n. v. Port of Seattle,* 716 F.2d 669, 673 (9th Cir. 1983), the facts presented in the Complaint demonstrated that MCA asserted such a right and that it should be permitted to put on its proof.

As stated, § 2210(a) clearly intended to confer rights upon air carriers and fixed-based operators. *See discussion, supra,* at pp. 5-9. Also, as noted, the statute makes use of mandatory language requiring airport operators to insure that the airport "will be available for public use on fair and reasonable terms without unjust discrimination" as well as providing that "there will be no exclusive right" for the use of airport facilities. 49 U.S.C. §§ 2210(a)(1) and 2210(a)(2).

The Second Circuit ruled that the "comprehensive enforcement scheme" of the Federal Aviation Act manifested Congressional intention to foreclose an action under § 1983. Section 2210, however, does not arise under the Federal Aviation Act; rather, it was a provision of the Airport and Airway Improvement Act of 1982. The latter act contains *no* independent enforcement mechanism. Further, 49 U.S.C. § 1506 [§ 1106 of the Federal Aviation Act] specifically provides that the statutory remedies provided therein are not intended to be exclusive.

Based upon this reasoning, MCA has stated facts at the very least sufficient to overcome a motion to dismiss. MCA has alleged that it was denied the right to make use of the Town airport year-round because

of the Town's decision to protect an already existing carrier. That was deemed sufficient to state a cause of action in *New York Airlines,* 623 F. Supp. at 1448. It is sufficient here as well. This is particularly true in view of the fact that the Federal Aviation Administration explicitly found that the town was discriminating against MCA in refusing to permit it to operate year-round. *See* Letter of Thomas C. Halloran, Regional Counsel, dated January 7, 1985, Appendix H. *See also City of Pompano Beach v. F.A.A.,* 774 F.2d 1529 (11th Cir. 1985).

B. 49 U.S.C. § 2210 Provides a Private Right of Action.

In addition to being permitted to assert its claims arising out of the protections accorded by 49 U.S.C. § 2210 under the auspices of 28 U.S.C. § 1983, § 2210 itself creates an implied right of action that permits MCA privately to assert its rights in the federal courts.

In *Cort v. Ash,* 422 U.S. 66 (1975), this Court stated that four factors must exist before a private right of action may be implied under a federal statute:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the

> States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations omitted).

As we have seen in the analysis of MCA's rights under § 1983 *supra*, § 2210(a) meets all four of these enunciated factors.

First, it is evident from the legislative history of the Airport and Airway Improvement Act that air carriers and fixed-base operators are the class "for whose *especial* benefit the statute was enacted". As noted, the legislative history of the 1976 revisions to the predecessor to § 2210 made it clear that the amendments were intended to recognize "the legitimate interests of air carriers and fixed-based operators in development at airports." Further, airport operators are prohibited from charging "discriminatory rates, fees, rentals, and other charges to airport businesses which make the same or similar uses of such airport utilizing the same or similar facilities." H.R. Rep. No. 94-594, 94th Cong. 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 1600, 1614. *See discussion in New York Airlines,* 623 F. Supp. at 1447.

The text of the statute itself also makes clear that air carriers and fixed-based operators are within the class that the statute was intended to protect. Section 2210(a)(2) states that "there will be no exclusive right" for the use of airport facilities. Section 2210(a)(1) provides that each air carrier "shall be subject to . . . nondiscriminatory and substantially comparable" terms and conditions. There is no indication, as there is in other aviation acts, that these provisions

were enacted solely for the benefit of the general public. *Compare* 49 U.S.C. §§ 1305 and 1349; *New York Airlines,* 623 F. Supp. at 1448-1450. To the contrary, § 2210 specifically addresses issues that are of concern only to air carriers such as the prohibition of discriminatory treatment and a prohibition of the exclusive use of air facilities. Thus, § 2210 meets the first of the *Cort* criteria.

Second, the Court must inquire as to whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?" *Cort,* 422 U.S. at 78. As noted, the Airport and Airway Improvement Act has no independent enforcement mechanism. In other words, the Federal Aviation Administration is not empowered pursuant to that act to enforce the provisions of the statute. It is anomalous to suggest that the Congress would enact a legislative scheme specifically aimed at preventing discrimination against air carriers and prohibiting the exclusive use of air facilities if there was to be no enforcement mechanism. There is no expression of Congressional intent to deny such a remedy. Under the circumstances, it seems clear that there was a Congressional intention that an air carrier be permitted to enforce its rights privately since the Federal Aviation Administration is not granted the right to do so in its behalf.

The third *Cort* factor to be considered is whether an implied right of action is consistent with the underlying purpose of the legislative scheme. This factor is closely related to the second. Here the predominant purpose of the legislative scheme is to prevent exclusive use of air facilities in order to insure that the critical component of a deregulated system—compe-

tition—can flourish. Absent any other enforcement mechanism, there must be a method by which private parties can seek relief from discriminatory treatment. Any other result would be inconsistent with the statutory scheme.

Finally, the Court is to determine whether the cause of action is one traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law. Of all the factors, this is the most easily decided in MCA's favor. The use of air facilities has long been regulated by the United States. The Federal Aviation Act was first adopted in 1958. Prior to the passage of the Airline Deregulation Act of 1978, all aspects of travel by air were regulated by the federal government. The intense federal interest in this area continues today, and did in 1982 when the Airport and Airway Improvement Act (of which 49 U.S.C. § 2210 is a part) was enacted.[5] This is traditionally an area of federal regulation and it is appropriate for an air carrier's rights to be protected by federal legislation—and by the federal courts.

III. The Town's Activities Are Not Protected From Injunction Under The State Action Doctrine

In Count I MCA sought, among other things, injunctive relief under 15 U.S.C. § 26 to prohibit the Town from conspiring with the other air carrier, East

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[5] In 1984, Congress removed any question of the prohibition contained in 49 USC ¶ 1305(a) by an amendment deleting from subparagraph 21 thereof the word "interstate" preceding the final two words "air transportation." The effect of the amendment was to extend the prohibition against state action to all air carriers whether authorized for interstate or intrastate air transportation.

Hampton Aire, Inc. (EHA), to both restrain trade and create a monopoly at the East Hampton Airport, activities which are prohibited by 15 U.S.C. §§ 1 and 2. It was specifically alleged that the Town board and EHA conspired to prevent MCA from obtaining year-round use of the air facilities. These actions were directly related in an illegal restraint of trade and have created a monopoly for the benefit of EHA.

The Second Circuit reasoned that a suit for injunctive relief could not be maintained because of the "state action doctrine," most recently enunciated by this Court in *Town of Hallie v. City of Eau Claire*, ___ U.S. ___, 105 S. Ct. 1713 (1985). *See also Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982); *City of Lafayette v. Louisiana Power and Light Co.*, 435 U.S. 389 (1978); *Parker v. Brown*, 317 U.S. 341 (1943).

The *Hallie* doctrine exempts municipalities from antitrust violations if they establish "that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.' " *Hallie*, 105 S. Ct. at 1716 (quoting *City of Lafayette*, 435 U.S. at 413). As the Second Circuit noted, a municipality is entitled to protection by the exemption where it "demonstrate[s] that it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Hallie*, 105 S. Ct. at 1717.

The Second Circuit relied upon N.Y. Gen. Mun. Law §§ 350-357 (McKinney 1974 & Supp. 1984-85), as providing the necessary clear articulation of State policy to displace competition with monopoly public service as required by *Hallie*.

That statute, provides in part, that a Town Board operating a local airport may:

> 5. Lease, or sub-lease the real property or lease, contract or otherwise agree, on an exclusive or nonexclusive basis, for the entire operation for such airport or landing field, or of any part thereof, or for the rendering of various services or conduct of business activities, on or at said airport or landing field. . . .

The defect in this reasoning is, however, that the New York Law is itself illegal because it runs afoul of the Supremacy Clause of the Constitution of the United States, U.S. CONST., art. VI, cl. 2, which invalidates state laws that "interfere with or are contrary to" federal law. *See Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824).[6] With regard to the Federal Aviation laws, it has been constantly reemphasized that the Federal legislation is supreme and preemptive when it conflicts with municipal authorities attempting to exercise proprietary and non-proprietary restrictions over aircraft. This has been true in airport noise cases, *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624 (1973); *San Diego Unified Port District v. Gianturco,* 651 F.2d 1306 (9th Cir. 1981), *cert. denied,* 455 U.S. 1000 (1982); *British Airways Board v. Port Authority of New York,* 564 F.2d 1002 (2d Cir. 1977); *United States v. County of Westchester,* 571 F. Supp. 786 (S.D.N.Y. 1983); *United*

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[6] Moreover, the New York law was originally adopted in 1945 (as a replacement for a 1928 statute) long before the passage of the applicable Federal Aviation laws.

States v. State of New York, 552 F. Supp. 255 (N.D.N.Y. 1982), *aff'd*, 708 F.2d 92 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984), in exclusive FBO lease cases, *City of Pompano Beach v. F.A.A.*, 774 F.2d 1529 (11th Cir. 1985), and in exclusive access cases, *City of Dallas v. Southwest Airlines Co.*, 371 F. Supp. 1015 (N.D. Tx. 1973) *aff'd*, 494 F.2d 773 (5th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974), *rehearing denied*, 420 U.S. 913 (1975), most recently in the access case involving New York Airlines. *New York Airlines, Inc. v. Duke County*, 623 F. Supp. 1435 (D.C. Mass. 1985). Only the decision of the Second Circuit in this case suggests that federal law must take a back seat to state and local regulations.

The New York Law dir ctly conflicts with the prohibitions of the exclusive use of an air facility by an air carrier contained in the Federal Aviation Act, 49 U.S.C. §1305(a). That act provides:

> Preemption. (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this Act to provide air transportation.

49 U.S.C. § 1305(a).

Section 352 of the New York Municipal Laws quoted above directly violates the prohibitions of §1305(a) which by its very title "preempts" this field of the law and prohibits states from regulating rates,

routes or services of an air carrier. It cannot, and has not, been argued that the actions of the Town here were anything other than an attempt to regulate MCA's rates, routes and services. Thus, the invalid New York law can provide no immunity to the Town to protect it from injunctive relief.[7]

The Second Circuit posited that § 1305(a) does not preempt the activity at issue here because § 1305(b)(1) provides that subsection (a) is not to be construed to limit the authority of "any . . . political subdivision as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights." 49 U.S.C. § 1305(b). It apparently was the view of the Second Circuit that this subsection overrides § 1305(a) and that because the Town was exercising its proprietary rights in leasing property there was no conflict between the federal and state statutes.

The effect of the ruling of the Second Circuit is to totally reverse the intention of the Airline Deregulation Act. The primary purpose of that Act was to allow the marketplace to make judgments as to which and how many carriers should operate in any given air facility. Section 1305(a) was intended to preempt local regulations of routes, rates and services. The Town's actions more than regulate MCA's routes, rates and services—they effectively prevent MCA from existing at East Hampton.

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[7] Even during this litigation, the Town has required that MCA furnish its proposed rates, routes, and services as a precondition to the Town's granting MCA permission to provide year round service. *See* Appendix I.

Nowhere in the record did the Town attempt to justify its decision on any basis whatsoever, such as, for example, that there is not enough space at the terminal, that MCA's operations would increase noise, or that MCA was an unsafe carrier.

Rather, the Town is attempting to exercise precisely the economic judgment which the Civil Aeronautics Board formerly wielded—the Town has chosen EHA over MCA. That choice is not merely to favor EHA, but to totally destroy MCA and make EHA the sole beneficiary of all of MCA's business. Such a decision is not, and cannot, be shielded from antitrust scrutiny. The decision of the Second Circuit, if it is not reversed, will immunize the actions of airport proprietors in excluding competition under the rationale that it is simply a matter of contract within the proprietary rights of an airport operator. Clearly that was not the intention of Congress.

As stated, sound precedent demonstrates that there is a limitation to the definition of "proprietary powers."[8] Surely Congress did not intend by adopting subsection (b) to render subsection (a) a dead letter. To reach that conclusion this Court must not only ignore all standards of statutory construction, but must also impliedly overrule nearly three decades of sound authority, and finally, discard or at least dismantle the supremacy clause.

In sum, the Town's activities violate 15 U.S.C. §§ 1 and 2. The Second Circuit in effect so found.[9] The Town is not protected from injunctive relief by op-

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[8] *British Airways Board v. Port Authority of New York*, 564 F.2d 1002 (2d Cir. 1977); *United States v. County of Westchester*,

eration of the state action doctrine because the New York Municipal Law relied upon is invalid under the Supremacy Clause of the Constitution of the United States in that it attempts to permit regulation in an area preempted by federal law, namely, 49 U.S.C. § 1305(a).

CONCLUSION

For these reasons, Petitioner respectfully requests this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit in order that the decision of that court be reversed.

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571 F. Supp. 786 (S.D.N.Y. 1983); *United States v. State of New York,* 552 F. Supp. 255 (N.D.N.Y. 1982), *aff'd,* 708 F.2d 92 (2d Cir. 1983), *cert. denied,* 466 U.S. 936 (1984); *San Diego Unified Port District v. Superior Court,* 136 Cal. Rptr. 551 (Cal. Dist. Ct. App.), *cert. denied sub nom., Britt v. San Diego Unified Port District,* 434 U.S. 859 (1977); *But see Arrow Air, Inc. v. Port Authority of New York,* 602 F. Supp. 314 (S.D.N.Y. 1985); *Global International Airways Corp. v. Port Authority of New York,* 727 F.2d 246 (2d Cir.), *reh'g denied,* 731 F.2d 127 (2d Cir. 1984); *Santa Monica Airport Ass'n v. City of Santa Monica,* 659 F.2d 100 (9th Cir. 1981); *National Aviation v. City of Hayward,* 418 F. Supp. 417 (N.D. Cal. 1976).

[9] "We therefore must assume that the New York legislature contemplated the kind of anticompetitive activity in which the Town of East Hampton has engaged." 784 F.2d at 93.

Respectfully submitted,

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Date: June 25, 1986

APPENDIX

APPENDIX A

Docket No.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
MONTAUK-CARRIBEAN AIRWAYS, INC., d/b/a
LONG ISLAND AIRLINES,

Plaintiff,

-against-

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as the Town Board of the Town of East Hampton, CHARLES T. SMITH, RUSSELL STEIN, EAST HAMPTON AIRE, INC., and FRANK LA VIGNA,

Defendants.

COMPLAINT

JURISDICTION

1. The jurisdiction of this Court is based upon the Sherman and Clayton Acts, 15 USC §§1, 2, 15 and 26; Federal Aviation Act, 49 USC §§1305 and 1349a; Civil Rights Law, 42 USC §1983; and the principles of pendent jurisdiction.

2. The venue of this action is properly before the United States District Court for the Eastern District of New York since all of the parties hereto reside within such district.

BACKGROUND

3. At all times hereinafter mentioned, MONTAUK-CARRIBEAN AIRWAYS, INC. (MCA) was and still is a New

York corporation operating its business as an air carrier within the meaning of §1305 of the Federal Aviation Act involved in interstate commerce and as a fixed base operator (FBO) within the meaning of § 1349a of the Federal Aviation Act at East Hampton Airport, East Hampton, Suffolk County, New York (the Airport), and, since April 1984, doing business under the name LONG ISLAND AIRLINES.

4. Upon information and belief, the defendants PARSONS, FINAZZO, BULLOCK and KING are residents of the Town of East Hampton and, since at least January 1983, have been and still are duly elected councilmen of the Town of East Hampton. Upon information and belief, defendant HOPE is a resident of the Town of East Hampton and, since January 1984, has been and continues to be the duly elected supervisor of the Town of East Hampton who, together with the aforementioned councilmen, constitute the town board which is the governing body of the Town of East Hampton.

5. Upon information and belief, RUSSELL STEIN is a resident of the Town of East Hampton and has been, since January 1984, the Town Attorney of the Town of East Hampton.

6. The Town of East Hampton (the Town) is a municipal corporation located within the County of Suffolk and State of New York and is, and at all times mentioned herein has been, the owner and operator of the Airport.

7. Upon information and belief, CHARLES T. SMITH is a resident of the Town and is, and at all times mentioned herein has been, employed by the Town as the manager of the Airport.

8. Upon information and belief, EAST HAMPTON AIRE, INC. (EHA) is a domestic corporation maintaining its place of business as an FBO at the Airport.

9. Upon information and belief, FRANK LA VIGNA is a resident of the Town, and at all times hereinafter mentioned is and has been the chief executive officer of EHA.

10. Pursuant to the Airport and Airway Improvement Act of 1982 (49 USC §2201 et seq, and specifically 49 USC §2204a, Airport Development and Airport Planning (ADAP)) the Town entered into a Grant Agreement (the Grant Agreement) with the Federal Aviation Administration (FAA), which Agreement is identified as Grant Agreement Project No. 3-36-0024-01-83, Contract No. FA EA2445, which was executed on 29 September 1983.

11. Pursuant to 49 USC §2210 and the Grant Agreement, the Town agreed not to discriminate against any air carrier using the Airport or any fixed base operator located at the Airport and further agreed to grant no exclusive right to any person providing aeronautical services to the public.

12. Pursuant to the Grant Agreement, the Town has received ADAP funding for development and improvement of the Airport.

13. On or about 12 June 1978, the Town entered into a Lease Agreement with EHA (the EHA Lease) under which EHA commenced operations as an FBO at the Airport.

14. Plaintiff had been operating as an FBO and air carrier at the Airport on a year-round basis for over 15 years prior to the execution of the current lease dated 28 December 1979 between plaintiff and the Town (the MCA lease). That lease was denominated "Seasonal Fixed Base Operator's Agreement East Hampton Airport Lease", covered a term from 1 January 1980 through 31 December 1989, directed that certain services must be provided by plaintiff during the period from 1 May through 30 September of each year (the season) and that plaintiff must be prepared to provide all FBO services at any time, but

contained no provision specifically prohibiting any of plaintiff's operations during the period from 1 October through 30 April (the off-season).

15. The annual rent provided in the EHA lease was $15,000.00 per year payable in June of each year plus $.03 per gallon for each gallon of aviation fuel delivered to the Lessee. The annual rent provided in the MCA lease was $15,000.00 per year payable in five equal installments of $3,000.00 per month for each month from May through September of each year plus $.03 per gallon for each gallon of fuel delivered to the Lessee.

16. In 1983, plaintiff planned to continue its air carrier and FBO operations after 30 September but was specifically prohibited from doing so by the Town Board as expressed in a letter from defendant PARSONS dated 28 September 1983.

17. On 18 November 1983, a hearing was held by the Town Board as to whether plaintiff should be allowed to be a year-round operator at the Airport. At that hearing, the Board took testimony from representatives of both plaintiff and EHA.

18. In December 1983, plaintiff submitted to the Town Board a lease amendment executed by plaintiff providing for the immediate elimination of any seasonal restriction on plaintiff's operations, which lease amendment was rejected by the Town Board.

19. Pursuant to the provisions of Rider #2 to the MCA lease, the rent and fees to be paid pursuant to such lease for the second five years thereof were to be renegotiated during 1984. Upon the Town Board's insistence, an entire proposed lease was prepared by the plaintiff and submitted to the Town Board on 25 September 1984. No response in writing has ever been made to such proposed lease.

20. On 1 October 1984, plaintiff attempted to continue its air carrier and FBO operations at the Airport.

21. By letter dated 1 October 1984, STEIN, as Town Attorney, acting ostensibly upon the unanimous direction of the Town Board, notified plaintiff in writing of violation of plaintiff's lease by virtue of the continuance of its operations.

22. Thereafter, by letter dated 22 October 1984, STEIN, as Town Attorney, and ostensibly on the express direction of the Town Board, notified plaintiff of the conditional termination of its lease should it fail, amongst other things, to discontinue all operations at the Airport until 1 May 1985.

23. In order to avoid the termination of its lease, plaintiff discontinued all air carrier operations and all FBO operations at the Airport at the end of October 1984.

24. Plaintiff complained to the FAA as to its treatment by the Town Board, as a result of which the FAA commenced an investigation of the allegation of discrimination at the Airport by reason of the refusal of the Town to allow plaintiff to operate year-round.

25. By letter dated 7 January 1985 to STEIN, THOMAS C. HALLORAN, regional counsel for the FAA notified the Town of the FAA's conclusion that plaintiff is not being treated on fair and reasonable terms and without unjust discrimination in violation of 49 USC §1349 and Assurance 20 of the Town's Grant Agreements with the FAA.

26. On 7 December 1984, the Town Board adopted a resolution directing that a public hearing be held on 18 January 1985 concerning the following questions:

> "1. Whether it is reasonable, prudent and in the best interests of the people of the Town of East Hampton to authorize year-round operation at the Town Airport by more than one (1) fixed-base operator ("FBO").
>
> 2. If the answer to question No. 1 is negative and the Town should continue to limit year-round

> fixed base operations to a single company, whether any such limitation can and will comply with all applicable FAA regulations, including those which appear to permit such a limitation only where:
>
> . . . it would be unreasonably costly, burdensome or impractical for more than one fixed base operator to provide [FBO] services, and if allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-base operator and such airport."

27. On 18 January 1985, a public hearing was held before the Town Board, at which time the Board took testimony from representatives of both plaintiff and EHA. No decision thereafter was rendered by the Town Board.

COUNT I

28. During 1983, 1984 and to the present, the defendants have conspired to restrain trade and to create a monopoly for the benefit of defendant EHA, which has caused a substantial lessening of competition and a substantial impact on interstate commerce resulting from loss of sales and profits by plaintiff. Plaintiff has been substantially damaged thereby in its business and property within the meaning of the Anti-Trust Laws of the United States.

29. The prohibition of plaintiff's air carrier operations at the Airport during 1983, and 1984 and to the present by the defendants HOPE, PARSONS, BULLOCK, FINAZZO and KING as the Town Board of the Town and STEIN as the Town Attorney, was in violation of the federal pre-emption as to rates, routes or services of any air carrier as provided in 49 USC §1305 and such action was taken willfully, deliberately, with full knowledge of its

violation of federal law and with the intent of granting to EHA a monopoly to the detriment of plaintiff.

30. The effect of the defendants' actions has been to eliminate air carrier competition at the Airport, to reduce the plaintiff's off-season share of the air carrier business to zero and to reduce plaintiff's year-round market share from 44% in 1980 to 11% in 1984.

31. The actions of the defendants HOPE, PARSONS, BULLOCK, FINAZZO, KING and STEIN in prohibiting off-season air carrier operations of plaintiff during 1983, 1984 and to the present were beyond the statutory authority of those individuals as officials of the Town, and therefore such individuals are personally liable for the damages resulting from their actions.

32. The actions of the defendants HOPE, PARSONS, BULLOCK, FINNAZO and KING, acting as the Town Board of the Town and STEIN as Town Attorney, in prohibiting FBO operations by the plaintiff from January 1984 to the present were in violation of 49 USC §1349a and such actions were taken willfully, deliberately and with full knowledge of the law and with the intention of granting to EHA a monopoly to the detriment of plaintiff.

33. The Town Board empowered SMITH, as Airport Manager, to designate and distribute to plaintiff and EHA, tie-down and aircraft parking spaces for which the FBO's charge daily fees, and which parking and tie-down spaces also generate fuel sales to the aircraft operators.

34. SMITH, acting with the approval of the Town Board and over the objections of plaintiff, during 1983 and 1984 distributed approximately 90% of the tie-down and parking spaces to EHA and the remaining 10% to the plaintiff during the season, and all of the tie-down and all but two of the parking spaces to EHA during the off-season.

35. Commencing in 1983, the defendants PARSONS, BULLOCK, FINAZZO, KING and SMITH, joined by

defendant HOPE in 1984, acted in combination and conspiracy with defendants LA VIGNA and EHA to direct transient business at the Airport to the parking and service facilities of EHA in order to enhance the business of EHA to the detriment of the plaintiff.

36. The actions of the defendants with reference to FBO operations at the Airport have been to create a monopoly for the benefit of the defendant EHA during the off-season, a substantial monopoly for the defendant EHA during the season, and the continuing diversion of business away from the plaintiff to its detriment.

37. During 1983, 1984 and to the present, the defendants have acted to create and enforce a monopoly for the benefit of defendant EHA at the Airport during the off-season and to reduce plaintiff's competitive position during the season to the extent of creating a substantial monopoly for defendant EHA during the entire year in violation of 15 USC §§1 and 2 and have thereby damaged plaintiff.

COUNT II

38. 15 USC §1305 provides for federal pre-emption and prohibits any state or political subdivision thereof from regulating rates, routes or services of any air carrier, thereby prohibiting the Town from denying equal access by the plaintiff to the Airport.

39. 49 USC §1349a prohibits unjust discrimination against an FBO or the grant of an exclusive right to an FBO.

40. The intention and effect of the Federal Aviation Act was to minimize governmental interferences with free competition amongst FBOs at federally funded airports for the benefit of the public and FBOs situated similarly to the plaintiff.

41. As an air carrier and FBO operating at a federally funded airport, plaintiff is part of a group intended to be

benefited by the Federal Law and entitled to redress for violation of its rights by the defendants.

42. In prohibiting plaintiff from operating during the off-season, the defendants violated the assurances required by 49 USC §2210a and the Sponsor's Assurances contained in the Grant Agreement in failing to provide equal access to plaintiff to the use of the Airport and in unfairly discriminating against plaintiff by charging to plaintiff the same annual rent as to EHA but only for five months use.

43. The Town Board through SMITH as airport manager, imposed upon plaintiff a passenger head tax during 1983 and 1984 in deliberate and knowing violation of federal pre-emption under 49 USC §1305 and compelled payment from plaintiff in the amount of $2,200.00.

44. As a result of the actions of the defendants in violation of the provisions of the Federal Aviation Act, plaintiff has been rendered uncompetitive and has suffered great losses in sales and profits.

COUNT III

45. The actions of the defendants HOPE, PARSONS, BULLOCK, FINAZZO and KING as the Town Board, STEIN as the Town Attorney, and SMITH as the Airport Manager, in prohibiting plaintiff's air carrier operations during the off-season of 1983, 1984 and to the present and prohibiting plaintiff's other off-season FBO operations in 1983, 1984 and to the present, violate the terms of the MCA lease which contains no such prohibitions and plaintiff's right to quiet enjoyment of the leased premises.

46. As a result of the aforementioned violations of plaintiff's lease, plaintiff has suffered substantial damage in the form of loss of business and profit, to which it is entitled to recompense.

COUNT IV

47. Commencing in 1983, the defendants PARSONS, BULLOCK, FINAZZO and KING, joined by the defendants HOPE and STEIN in January 1984, combined and conspired with defendants EHA and LA VIGNA to illegally create for defendant EHA a monopoly in air carrier and FBO services at the Airport, and to deliberately and maliciously destroy the business of plaintiff at the Airport.

48. In furtherance of the above mentioned conspiracy, the Board Members, commencing in 1983 and continuing to date, have forwarded to defendant LA VIGNA copies of correspondence from plaintiff and its attorneys, over objections by plaintiff and its attorneys, while failing to answer correspondence from plaintiff and its attorneys.

49. The Town Board, through SMITH as airport manager, in combination with EHA and LA VIGNA, imposed upon plaintiff landing fees which were not required of EHA and defendant SMITH utilized the Airport radio equipment to advertise EHA's fuel sales and services to transient aircraft, resulting in the diversion of a great deal of business from plaintiff to defendant EHA, reassigned plaintiff's tie-down and landing spaces to defendant resulting in loss to plaintiff of the income generated by such tie-down and parking spaces and directed plaintiff to pay to defendant EHA parking and tie-down fees for plaintiff's own aircraft, and authorized the replacement of plaintiff's sign next to the terminal building by a sign from defendant EHA.

50. The defendants harrassed plaintiff by causing criminal charges for environmental pollution to be brought against MICHAEL S. PERAGINE, plaintiff's president, in July of 1984 with knowledge to the involvement of Mr. PERAGINE with plaintiff and on property not leased to plaintiff.

51. Despite repeated requests from plaintiff from May through September 1984, defendant SMITH refused to

supply information demanded, in violation of the Freedom of Information law (New York Public Officer's Law §§84 et. seq.) and further denied the existence of and refused to provide a survey, map or sketch of the Airport which had consistently been in his possession, until 28 September 1984, which document was required in order to try to delineate parking and tie-down spaces.

52. With respect to air carrier operations, the defendants PARSONS, BULLOCK, FINAZZO and KING, acting in concert with and at the behest of defendants EHA and LA VIGNA prohibited plaintiff's air carrier operations during the off-season from 1 October 1983 through 31 December 1983, and thereafter from 1 January 1984 through 30 April 1984, in conjunction with the defendants HOPE and STEIN. Such prohibition was illegal, violative of 49 USC §1305, beyond the authority of the Town Board, known by the defendants to be illegal, and done maliciously and with the intent of destroying plaintiff's business.

53. As a result of defendants' actions, plaintiff's business has been greatly damaged and plaintiff has suffered a substantial loss of sales and profits.

COUNT V

54. The abovementioned actions of the defendants HOPE, PARSONS, BULLOCK, FINAZZO, and KING, acting as the Town Board of the Town, STEIN, acting as the Town Attorney of the Town, and SMITH, acting as the airport manager for the Town, were taken under color of the Town Law of the State of New York and ordinances of the Town of East Hampton and caused the deprivation of plaintiff's rights to operate as an air carrier and FBO under the provisions of the Federal Aviation Act, resulting in damage to plaintiff, all in violation of 42 USC §1983.

Wherefore, plaintiff requests judgment against the defendants as follows:

A. On the first count, that the defendants be adjudged to have violated the antitrust laws of the United States, that the actual damages to plaintiff's business and property resulting from such violations be determined and that plaintiff have judgment against the defendants for three times the amount of the actual damages so determined, together with its costs and a reasonable attorney's fee as provided by law;

B. On the second count, that the defendants HOPE, PARSONS, BULLOCK, FINAZZO and KING, individually and as constituting the Town Board of the Town of East Hampton; STEIN, individually and as the Town Attorney of the Town of East Hampton; and SMITH, individually and as the airport manager of the Town of East Hampton, be adjudged to have violated the Federal Aviation Act, and that plaintiff have judgment for the amount of the damages determined to have resulted from such violations;

C. On the third count, that the Town of East Hampton be adjudged to have violated its lease with the plaintiff and that plaintiff have judgment against the Town of East Hampton for the amount of damages determined to have resulted from such violation;

D. On the fourth count, that defendants be adjudged to have conspired against plaintiff, that the actual damages to plaintiff's business and property be determined, and that plaintiff have judgment against the defendants for three times the amount of such damages and for $10,000,000.00 as punitive damages for such conspiracy;

E. On the fifth count, that defendants HOPE, PARSONS, BULLOCK, FINAZZO, KING, STEIN and SMITH, individually and as officials of the Town of East Hampton be adjudged to have deprived plaintiff of its rights, privileges and immunities under the Constitution and Laws of the United States, and that plaintiff have judgment for the damages to plaintiff's business and property and for legal fees pursuant to 42 USC §1988.

F. A declaration that plaintiff's lease entitles plaintiff to operate as an air carrier and fixed base operator year-round.

F. A permanent injunction against the defendants prohibiting them from interfering with the year-round operation of plaintiff as an air carrier and fixed base operator.

Dated: Melville, New York
8 February 1985

/s/ I. LEONARD FEIGENBAUM
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APPENDIX B

85-CV-420

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
MONTAUK-CARIBBEAN AIRWAYS, INC., d/b/a
LONG ISLAND AIRLINES,

Plaintiff,

-against-

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as the Town Board of the Town of East Hampton, CHARLES T. SMITH, , RUSSELL STEIN, EAST HAMPTON AIRE, INC., and FRANK LA VIGNA

Defendants.

DECISION AND ORDER

BRAMWELL, D. J.

Plaintiff Montauk Caribbean Airways, Inc. d/b/a Long Island Airlines (MCA) commenced this action against members of the Town Board of the town of East Hampton, New York and others. The action is based on the Sherman and Clayton antitrust acts, the Federal Aviation Act, and federal civil rights law. Defendants Hope, Parsons, Bullock, Finazzo, King, Smith and Stein (the Town defendants) collectively move to dismiss the complaint for failure to state a claim. The plaintiff cross-moves for a preliminary

injunction, for an order dismissing defendants East Hampton Aire's (EHA) and LaVigna's counterclaims, and for an order transferring the matter to the federal courthouse in Uniondale, New York. The plaintiff also opposes the Town defendant's motion. Defendants EPA and LaVigna oppose the plaintiff's motion to dismiss their counterclaims.

This action relates to a lease permitting plaintiff MCA to conduct business as a fixed-base operator (FBO) at an airport (the Airport) owned and operated by the Town of East Hampton, New York (the Town). The plaintiff is a New York corporation doing business as an air carrier at the Airport. Defendants Parsons, Finazzo, Bullock and King are councilmen of the Town and sit on the Town Board. Defendant Hope is the supervisor of the Town Board. Defendant Russell Stein is the Town's attorney while the Town employs defendant Charles Smith as manager of the Airport. Defendant Frank LaVigna is chief executive officer of defendant East Hampton Aire (EHA) which operaters as an FBO on a year-round basis at the Airport.

On or about December 28, 1979, the plaintiff and the Town entered into a ten-year lease denominated as a "Seasonal Fixed Base Operator's Agreement East Hampton Airport Lease." The effective span of the lease is from January 1, 1980 to December 31, 1989, and the lease authorizes MCA's FBO activities for only 5 months a year from May 1 to September 30 of each year. In 1983 and 1984, the plaintiff sought to operate beyond the annual September 30 cutoff date for FBO activity under the lease. However, the Town Board informed the plaintiff on each occasion that such activity was not authorized under the lease agreement. On each occasion, the plaintiff ceased operations.

In the fall of 1984, the plaintiff filed a complaint with the Federal Aviation Administration (FAA) charging the Town Board with unjust discrimination pursuant to 49

U.S.C. § 1349, and under the terms of a Grant Agreement between the FAA and the Town. The objective behind the complaint was to compel the Town to grant the plaintiff a full-year lease. On January 7, 1985, after an investigation, the FAA found that the Town's failure to grant the plaintiff a full-year lease was in fact discriminatory. The FAA also allotted the Town 30 days to rectify the situation.

On January 18, 1985, the Town Board held hearings on the question of extending the plaintiff's lease in accordance with the FAA's directive. The Board never issued an opinion or conclusion thereafter.

The instant action was commenced on February 8, 1985 seeking damages for the Town's leasing policy.

The Town defendants move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the complaint for failure to state a claim. The Town defendants argue that the plaintiff's claims under the Sherman Act, the Clayton Act, 42 U.S.C. § 1983, and the Federal Aviation Act are defective. The plaintiff opposes the motion and moves for a preliminary injunction. The plaintiff also moves to dismiss defendants EHA's and LaVigna's first and second counterclaims for defamation. These defendants oppose the plaintiff's motion. For reasons that follow, the Town defendants' motion is denied in part and granted in part. The plaintiff's motion is denied *in toto*.

The Court first turns to the Town defendants' motion to dismiss the complaint to the extent that it is based on the Sherman and Clayton Acts. The Town defendants argue that these acts are of no consequence in this case given the weight of the Local Government Antitrust Act of 1984 and the state action antitrust doctrine. The Court only partially agrees with the Town defendants' position.

The Local Government Antitrust Act of 1974, 15 U.S.C. §§ 34, 35, and 36, provides that:

> [n]o damages, interest on damages costs, or costs, or attorney's fees may be recovered under [the Clayton Act] from any local government, or official or employee thereof acting in an official capacity. 15 U.S.C. § 35(a). AND
>
> the term 'local government' means . . . a city, county, parish, town, township, village, or any other general function governmental unit established by State law. 15 U.S.C. § 34.

The prohibition on antitrust actions under these provisions is sweeping. This is clear from both the plain language of the Act and its legislative history, which indicate that the Act was intended to go further than the federal common law prohibition on such claims.

Here, the Court believes that the Local Government Antitrust Act bars that part of the complaint based on the Clayton Act. First, we are concerned in this case with local government employees and officials as contemplated under the Act. This is apparent as the Town defendants were either connected to the Town's general governmental functions through the Town board and its Attorney's Office, or by virtue of being appointed and employed by the Town. Second, the Town defendants were acting in their official capacities in executing and enforcing the lease in question, and in overseeing airport operations.

However, the court cannot take the same position on the plaintiff's Sherman Act claim. First, despite the Town defendants' assertions, the broad prohibition of the Local Government Antitrust Act does not reach Sherman Act claims. Section 35(a) of Title 15 clearly and exclusively refers to a prohibition of Clayton Act claims under sections 15, 15a and 15c of Title 15. Also, the legislative history refers to a straight and narrow purpose of prohibiting solely Clayton Act suits against localities. In fact, Page 2 of House Report 98-965 on the Act states that the aim

of the legislation is to preclude "suits . . . of the Clayton Act." Nothing in the House Report indicates otherwise.

Having said that, it becomes obvious that the plaintiff's Sherman Act claims may be precluded only under the federal common law state action standard as articulated in *Community Communications Co., Inc. v. City of Boulder.* This U. S. Supreme Court standard is far more strict than the Local Government Act's rule. The *City of Boulder* standard shuns blanket immunity and only protects local government officials performing pursuant to a "clearly articulated and affirmatively expressed" state policy. Such policy must indicate an intent to delegate authority the exercise of which may have an anticompetitive effect. Also, such policy must be actively supervised by the state. Here, the Court is not satisfied that the second leg of this has been satisfied. The Court is not persuaded that New York State authorities actively regulate the Town's management of airport affairs. Since the question of regulation is essentially one of fact, the Court will permit discovery to go forward as to this issue.

Hence, the plaintiff's Clayton Act claims are defective and are dismissed as to the Town defendants. The Sherman Act claims remain open.

The Court now turns to the Town defendants' argument that the complaint fails to state a claim under the Federal Aviation Act. Specifically, the Town defendants contend that the provisions the plaintiff relies on—sections 1305 and 1349 of the Federal Aviation Act—do not provide private causes of action, and that they are left for Federal Aviation Administration to enforce.

The Court agrees. Pursuant to the well-settled principles of *Cort v. Ash,* the mere facts that a federal statute has been violated and a person has been harmed, do not lead to the conclusion that a private cause of action is available. In order to determine whether a cause of action is avail-

able under a statute, the courts will, *inter alia*, turn to legislative history and statutory language for guidance.

In the present case, we are concerned with section 1305 and 1349. Section 1349(a) has been interpreted as prohibiting federally funded airports from discriminating against fixed-based operations. However, the provision does not articulate a private cause of action or mention the availability of court-fashioned remedies. The same is true of section 1305 which concerns federal preemption of authority to regulate air carriers. Also, the Court is aware of no policy underlying either section which suggests that a private right of action exists. More important, however, is the long line of precedent denying any unarticulated private rights of action under the Federal Aviation Act. Judge Curtin of the Western District of New York considered this issue in *Guthrie v. Genessee* where he concluded that the Federal Aviation Act did not provide a private cause of action. Judge Curtin's sound and thorough analysis on this point compels the Court to follow suit. Hence, the plaintiff's Federal Aviation Act claims are dismissed as to the Town defendants.

The Town defendants also move to dismiss the fifth count in the complaint pursuant to Rule 12(b)(6). Count five is brought pursuant to 42 U.S.C. § 1983 for deprivation of rights under the Federal Aviation Act. The Court believes that this count should be dismissed pursuant to the U.S. Supreme Court's decision in *Middlesex County Sewage Authority v. National Sea Clammers*. This decision provides that section 1983 is not available as a remedy for statutory violations if (1) Congress foreclosed private enforcement of a statute in the enactment itself, or (2) the statute at issue is of the type which does not create enforceable rights. The plaintiff's fifth count refers to rights it is purportedly entitled to pursuant to the Federal Aviation Act. However, as the Court has already decided, there is no private right of enforcement under the FAA. Hence, it is beyond doubt that the plaintiff falls into the

first category of cases prohibited under *Middlesex*. Count five is dismissed as to the Town defendants.

The Court now turns to the plaintiff's motion for a preliminary injunction under Rule 65. MCA seeks an injunction preventing the Town defendants from interfering with the plaintiff's support services and operations as an air carrier at the Airport on a year-round basis. The Court will not issue such relief.

The Second Circuit standard for issuance of a preliminary injunction is well-settled. The moving party must demonstrate the probability of immediate irreparable harm and either (1) a likelihood of success on the merits of its claim, or (2) sufficiently serious questions going to the merits making them a fair ground for litigation, and a balance of hardships tipping decidedly in the movants favor. In the recent case of *Citibank v. Citytrust*, the Second Circuit also emphasized that the movant must demonstrate that irreparable harm will result before a decision on the merits is rendered.

In this case, MCA cannot claim that irreparable harm will result before a decision on the merits is rendered. First, based on the FAA letter dated January 7, 1985, the agency may in fact step in between now and September 30 to issue relief. Second, the plaintiff would not be likely to suffer irreparable harm before its 1985 lease term actually expires on September 30, 1985. Between that time and now, the case could easily be disposed of or settled depending on the course pre-trial activities take.

The plaintiff also seeks to dismiss defendants EHA's and LaVigna's counterclaims for defamation. The motion is denied. These defendants have clearly alleged causes of action for defamation with adequate particularity to satisfy Rule 12(b)(6). Further, inasmuch as the plaintiff has offered no 3(g) statement as required under the Local Rules of this district and there has been little or no discovery at

this stage, the Court cannot grant the motion for summary judgment.

Finally, the plaintiff moves to transfer the entire matter to the United States district Court in Uniondale, New York. Rule 4(b) of the Calendar Rules for this district provides:

> *Long Island Case Designations.* Within twenty (20) days after the original assignment, any party may serve and file with *the chief judge* a written request to review the clerk's designation of, or failure to designate, a "Long Island Case." After consultation with the judge to whom the case was assigned, *the chief judge* shall review and determine the propriety of the designation. If the designation is changed then the clerk shall reassign the case in accordance with the determination of the *chief judge.*

Under this rule, any application must be directed to Chief Judge Weinstein.

Accordingly, the Town defendants' motions are granted except that the plaintiff's Sherman act claims may remain open. The plaintiff's motions are denied *in toto.*

IT IS

SO ORDERED.

/s/ HENRY BRAMWELL
U. S. D. J.

Dated: Brooklyn, New York
May 28th, 1985

APPENDIX C

85-CV-420

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,

Plaintiff,

-against-

JUDITH HOPE, RANDALL PARSONS,
ANTHONY BULLOCK, MICHAEL J. FINAZZO,
and HUGH KING, Individually and as
the Town Board of the Town of East Hampton,
New York, CHARLES T. SMITH, RUSSELL STEIN,
EAST HAMPTON AIRE, INC., and FRANK LA VIGNA,

Defendants.

DECISION AND ORDER

BRAMWELL, D. J.

Plaintiff Montauk Caribbean Airways, Inc. d/b/a Long Island Airlines (MCA) commenced this action against members of the Town Board of the Town of East Hampton, New York and others. The original complaint was based on the Sherman and Clayton federal antitrust acts, the Federal Aviation Act, and federal civil rights law. On May 28, 1985, this Court considered and rules on the "Town" defendants' motion to dismiss the complaint for failure to state a claim. It also rules on, *inter alia*, the plaintiff's cross-motion for a preliminary injunction. The Town defendants' motion was denied in part and granted in part. The plaintiff's cross-motion for an injunction was denied.

Now, both the Town defendants and the plaintiff move, pursuant to Rule 3(j) of the Civil Rules of the United States District Court for the Eastern District of New York, to reargue portions of their respective motions. For reasons that follow, the Court: (1) grants the Town defendants' motion to reargue and rules in their favor on the merits of their application; (2) grants the plaintiff's motion to reargue in part but denies its application on their merits; and (3) dismisses the complaint for lack of subject matter jurisdiction.

I. FACTUAL AND PROCEDURE BACKGROUND

A. Facts

The Court will merely restate the facts it relied on for its May 28, 1985 decision.

This action relates to a lease permitting plaintiff MCA to conduct business as a fixed-base operator (FBO) and air carrier (carrier) at an airport (the Airport) owned and operated by the Town of East Hampton, New York (the Town). The plaintiff is a New York corporation doing business as an FBO and carrier at the Airport. Defendants Parsons, Finazzo, Bullock and King are councilmen of the Town and sit on the Town Board. Defendant Hope is the supervisor of the Town Board. Defendant Russell Stein is the Town's attorney while the town employs defendant Charles Smith as manager of the Airport. Defendant LaVigna is the chief executive officer of defendant East Hampton Aire (EHA), which operates as an FBO on a year-round basis at the Airport.

On or about December 28, 1979, the plaintiff and the Town entered into a ten-year lease denominated as a "Seasonal Fixed Base Operator's Agreement East Hampton Airport Lease." The effective span of the lease is from January 1, 1980 to December 31, 1989, and the lease authorizes MCA's FBO activities for only 5 months per year from May 1, to September 30 of each year. In the years 1983 and 1984, the plaintiff sought to operate beyond the

annual September 30 cut-off date under the lease. However, the Town Board informed the plaintiff on each occasion that such activity was not authorized under the lease agreement. On each occasion, the plaintiff ceased operations.

In the fall of 1984, the plaintiff filed a complaint with the Federal Aviation Administration (FAA) charging the Town with unjust discrimination pursuant to 49 U.S.C. § 1349, and under the terms of a Grant Agreement between the FAA and the Town. The objective behind the complaint was to compel the Town to grant the plaintiff a full-year lease. On January 7, 1985, after an investigation, the FAA found that the Town's failure to grant the plaintiff a full-year lease was in fact discriminatory. The FAA also alloted the Town 30 days to rectify the situation.

On January 18, 1985, the Town Board held hearings on the question of extending the plaintiff's lease in accordance with the FAA's directive. The Board never issued a final opinion or resolution thereafter. The instant action was commenced on February 8, 1985.

B. Procedure

On May 28, 1985, the Court heard oral argument and ruled on motions presented by the Town defendants and MCA. The Town defendants moved, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the complaint for failure to state a claim. The Town defendants argued that the plaintiff's causes of action under the Sherman Act, the Clayton Act, 42 U.S.C. § 1983, and 49 U.S.C. §§ 1305 and 1349 were defective. MCA opposed the motion and moved for a preliminary injunction, among other things. The Court: (1) dismissed MCA's Clayton Act claim for damages, costs and fees; (2) dismissed part of MCA's Federal Aviation Act claim; (3) dismissed the plaintiff's claim under 42 U.S.C. § 1983; and (4) denied the plaintiff's motion for an injunction. We left

open MCA's claim for damages and injunctive relief under the Sherman Act and an injunction under the Clayton Act. The Court also did not reach MCA's claim under 49 U.S.C. § 2210(a) of the Federal Aviation Act.

By notice of motion dated June 4, 1985, the Town defendants moved to reargue their motion to dismiss. Their objective is to dismantle the remaining portions of MCA's federal antitrust claims for damages and an injunction. On June 10, 1985, MCA cross-moved for reargument. MCA takes issue with the Court's dismissal of the Clayton Act and § 1983 claims, and its denial of the preliminary injunction. The remainder of this opinion is devoted to the issues raised on reargument.

II. ISSUES TO BE RECONSIDERED

Local Rule 3(j) of the Civil Rules for this Court reads as follows:

> A notice of motion for reargument shall be served within ten (10) days after the docketing of the court's determination of the original motion and shall be served at least the same number of days before the return day as was required for the original motion. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be reargued orally. No affidavits shall be filed by any party unless directed by the court.

Given the language of this rule, the Court will reconsider the Town defendants' motion to reargue its motion to dismiss the antitrust claims raised by MCA. The Town defendants point out that a recent United States Court decision is dispositive of MCA's claims. Since the plaintiff

has correctly indicated that additional factors should be considered with respect to the dismissal of its section 1983 claim, this claim will also be reconsidered. However, there will be no reargument of the Court's application of the Local Government Antitrust Act of 1974 to this case. Even assuming, *arguendo,* the Act does not apply here, the Court will demonstrate that the plaintiff's federal antitrust causes of action are still barred under the state action doctrine. More importantly, the plaintiff's papers on this issue merely repeat its arguments of May 28, 1985. Finally, there will be no reargument of the denial of the injunction. None of the issues raised by the plaintiff were overlooked. Also, as shall be demonstrated, the Court lacks jurisdiction to issue such an injunction.

There is no need for oral argument here since the parties have adequately outlined their positions in the papers before the Court.

III. THE ANTITRUST CLAIMS

In its May 28, 1985 decision, the Court recognized that the state action doctrine barred antitrust actions against states and their municipalities in many cases. Relying on the state action standard of *Community Communications Co., Inc. v. City of Boulder,* 455 U.S. 40 (1982), the Court found that where the Town defendants had acted "pursuant to a clearly articulated and affirmatively expressed state policy," the Town had not demonstrated that such policy was actively supervised by New York State authorities. Hence, all of the plaintiff's Sherman Act claim and part of its Clayton Act claim (to the extent injunctive relief was sought) were left standing.

The Town defendants now direct the Court's attention to the decision in *Town of Hallie v. City of Eau Claire,* 105 S. Ct. 1713 (1985). In *Town of Hallie,* the Supreme Court recently ruled that the active state supervision requirement of *City of Boulder* "should not be imposed in cases in which the actor is a municipality." *Id.* at 1720.

Here, of course, the Town defendants are members of the municipality of the Town of East Hampton, New York.

Consequently, the remaining portion of the plaintiff's Clayton Act claim and all of the Sherman Act claim must fall as they are prohibited under the state action doctrine.

IV. THE SECTION 1983 CLAIM

MCA argues that the Court should not have dismissed its section 1983 cause of action. The thrust of MCA's position is that the Court wrongly dismissed the civil rights claim under the rule of *Middlesex City Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1 (1981). The Court disagrees.

Section 1983 authorizes suits to redress violations of rights, privileges, or immunities secured by the United States Constitution and federal statutes, if they are perpetrated under color of state law. *Maine v. Thiboutot,* 448 U.S. 1, 6 (1980). However, section 1983 does not apply where Congress has foreclosed private enforcement of a statute through section 1983 in the enactment itself, or where a statute is not of the kind that creates "rights" under section 1983. *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 28 (1981). Here, the plaintiff's civil rights cause of action is based on provisions of the Federal Aviation Act, namely 49 U.S.C. §§ 1305 and 1349(a). Neither of these statutes create rights.

In *Guthrie v. Genessee County,* 494 F. Supp. 950 (W.D.N.Y. 1980), it was explained that section 1349(a) did not create rights. Judge Curtin accurately described the provision as follows:

> Section 1349(a) . . . is . . . in the nature of a law for the protection of the general public, a provision which is *part of a statutory scheme to monitor how federal funds are spent.* Although § 1349 does prohibit exclusive rights to the use of airfields upon which federal monies have been spent,

> this does not constitute as compelling a reason to infer a private remedy *as where a class of persons has been granted certain rights by statute. Id.*, at 959 (emphasis added).

The Court adopts this characterization of the statute.

The Court holds a similar view of section 1305(a). That provision reads, in pertinent part, as follows:

> (a) Preemption. (1) Except as authorized in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation. (2) Except with respect to air transportation (other than charter air transportation) provided pursuant to certificate issued by the Board under section 1371 of this title, the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

As its plain language suggests, this statute exists solely for the purpose of establishing the dimensions of the federal government's authority over interstate air transportation. The provision itself does not create rights for air carriers or FBO's nor does it mention these parties. More importantly, the legislative history bears out this interpretation as its primary focus is on the respective spheres of federal and state authority over interstate and intrastate air transportation. Under these circumstances, the Court cannot hold that section 1305(a) creates rights for

air carriers or FBO's. *See* 1978 U.S. Code Cong. and Adm. News, p. 3737.

Consequently, the civil rights claim was correctly dismissed.

V. THE REMAINING FEDERAL CLAIM

Count II of the complaint contains the sole remaining federally based cause of action asserted by MCA. In Count II, MCA alleges that the defendants violated 49 U.S.C. § 2210(a) by discriminating against it. The plaintiff has, however, conceded that it did not purport to seek relief under section 2210(a). "Town Defendants' Reply Memorandum In Further Support Of Their Motion to Dismiss The Complaint And In Opposition To Plaintiff's Motion For A Preliminary Injunction," p. 15. Even so, a claim falling under section 2210(a) cannot withstand scrutiny under the rule of *Cort v. Ash,* 422 U.S. 66 (1975). Section 2210(a) directly concerns the relationship between airports and the Department of Transportation, and not the rights of FBO's and air carriers as against airports. But more importantly, it is the right of the Secretary of Transportation to enforce the provisions of section 2210(a). Private parties share no such right under the statute. Hence, there is no viable cause of action under section 2210.

VI. CONCLUSION

For the foregoing reasons, the plaintiff's federal claims are dismissed. The Court no longer has jurisdiction over this matter since the remaining claims are based on state law and all of the parties are New York State domiciliaries. Consequently, the complaint is hereby dismissed.

IT IS

SO ORDERED.

/s/ HENRY BRAMWELL

U. S. D. J.

Dated: Brooklyn, New York
September 4th, 1985

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 578-August Term 1985
(Argued November 25, 1985
Decided February 14, 1986)
Docket No. 85-7752

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a/ LONG ISLAND AIRLINES,
Plaintiff-Appellant,

v.

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as the Town Board of the Town of East Hampton, CHARLES T. SMITH, RUSSELL STEIN, EAST HAMPTON AIRE, INC., and FRANK LA VIGNA,
Defendants-Appellees.

Before:

TIMBERS, PIERCE and MINER,
Circuit Judges.

Appeal by Montauk-Caribbean Airways, Inc. from a judgement entered October 1, 1985 in the Eastern District of New York, Henry Bramwell, *District Judge,* dismissing federal claims against the Town of East Hampton and East Hampton Aire, Inc. for alleged violations of the federal antitrust laws, the Federal Aviation Act and the Fed-

eral Civil Rights Act, and also dismissing pendent state claims.

Affirmed.

I. LEONARD FEIGENBAUM, Melville, N.Y., *for appellant.*

ERIC J. LOBENFELD, New York, N.Y. (Sanford M. Litvack, Valerie A. Cohen, and Donovan Leisure Newton and Irvine, New York, N.Y., on the brief), *for appellees Hope, Parsons, Bullock, Finazzo, King, Smith and Stein.*

THOMAS A. HICKEY, New York, N.Y. (Joseph J. Ceccarelli, and Plunkett and Jaffe, New York, N.Y., on the brief), *for appellees East Hampton Aire, Inc. and Frank La Vigna.*

TIMBERS, *Circuit Judge:*

Appellant Montauk-Caribbean Airways, Inc., d/b/a Long Island Airlines, appeals from a judgment entered October 1, 1985 in the Eastern District of New York, Henry Bramwell, *District Judge,* dismissing, pursuant to Fed. R. Civ. P.12(b)(6), federal claims and pendent state claims.

Appellant commenced this action on February 8, 1985 against members of the Town Board of East Hampton, New York; the Town's attorney; the manager of the Town's airport; East Hampton Aire, Inc. ("EHA"), a competitor airline; and the latter's chief executive officer. The complaint alleged violations of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982); the Clayton Act, 15 U.S.C. §§ 15, 26 (1982); the Federal Aviation Act, 49 U.S.C. §§ 1305(a), 1349(a),

2210(a) (1982); and the Federal Civil Rights Act, 42 U.S.C. § 1983 (1982). The complaint also alleged pendent state claims for breach of contract and conspiracy. The action was based on the Town's refusal to allow appellant to serve as an air carrier and fixed-base operator at the East Hampton Airport on a year-round basis. Appellant alleged that the Town and EHA conspired to create a monopoly during the off-season months for the benefit of EHA.

In an order dated May 28, 1985, the district court, pursuant to Fed. R. Civ. P. 12(b)(6), dismissed the Clayton Act, § 1983 and Federal Aviation Act claims. After the Supreme Court's decision in *Town of Hallie v. City of Eau Claire*, ____ U.S. ____, 105 S.Ct. 1713 (1985), and after reargument before the district court, Judge Bramwell dismissed appellant's Sherman Act claim for injuctive relief and the pendent state law claims, and reaffirmed dismissal of the § 1983 claim.

We entered an injunction prohibiting interference with appellant's operations pending this appeal. For the reasons set forth below, we dissolve the injunction which we entered pending appeal and we affirm the judgement of the district court dismissing appellant's claims.

I.

This dispute arises from appellant's desire to obtain a lease permitting it to serve as a year-round fixed-base air carrier operator at he East Hampton Airport owned and operated by the Town of East Hampton. In 1978, appellant and the Town entered into a lease under which appellant was to operate as a fixed-base operator and air carrier at the airport. In December 1979, appellant and the Town entered into a ten-year lease which did not require appellant to provide year-round services. Appellant thereafter operated on a seasonal basis between May 1 and September 30 of each year. In 1983 and 1984, apparently after the arrival of new management, appellant sought permis-

sion to operate after September 30. The Town Board informed appellant that the lease did not authorize such post-seasonal operations.

In the Fall of 1984, appellant filed a complaint with the Federal Aviation Administration (FAA) under 49 U.S.C. § 1349, claiming that the Town of East Hampton unjustly discriminated against appellant. The FAA concluded that the failure to grant a full-year lease was discriminatory. The Town, however, did not act on the FAA decision in favor of appellant.

On February 8, 1985, appellant commenced the instant action, seeking the relief set forth above. Appellees, pursuant to Fed. R. Civ. P. 12(b)(6), moved to dismiss the claims. On May 28, 1985 the district court dismissed the Clayton Act claims for damages on the basis of the Local Government Antitrust Act of 1984, 16 U.S.C. § 35 (Supp. II 1984) (the Act).[1] The court also dismissed the claims asserted under the Federal Aviation Act and § 1983. The court thereafter granted the appellees' motion for written reargument pursuant to Local rule 3(j). In its decision of September 4, 1985, the court, applying the Supreme Court's recent decision in *Town of Hallie v. City of Eau Claire*, _____ U.S. _____, 105 S.Ct. 1713 (1985), dismissed the remaining antitrust claims under the state action doctrine. The court also reaffirmed its decision to dismiss the § 1983 claims; and, finding no private cause of action under the Federal Aviation Act, dismissed those claims as well.

II.

The principal issue raised on appeal is whether the Act or the state action doctrine, or both, bar appellant's an-

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[1] Hereafter in this opinion, when we refer to "the Act," we mean the Local Government Antitrust Act of 1984. When other statutes are referred to, such as the Clayton Act, the Sherman Act, or the Federal Aviation Act, we shall refer to them by name.

titrust action against a municipality which owns and operates a local airport. In determining whether the district court, pursuant to Rule 12(b)(6), properly dismissed appellant's federal claims, we must view the factual allegations in the complaint as true. *Jones-Bey v. Caso,* 535 F.2d 1360, 1362 (2 Cir. 1976).

The complaint alleged that appellees Town and EHA conspired to restrain trade and create a monopoly in favor of EHA in violation of the Clayton and Sherman Acts. Appellant submitted to the Town Board a proposed lease amendment which provided for the elimination of any seasonal restriction on appellant's operation. The Board held a public hearing but reached no formal decision. The lease has not been modified. Appellant argues that EHA has usurped a significant share of appellant's air carrier business.

Judge Bramwell held that the Act barred appellant's antitrust claim for treble damages under the Clayton Act. The Act insulates municipalities and their representatives from monetary claims arising under the antitrust laws. This recently enacted statute provides:

> "No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c of this title from any local government, or official or employee thereof acting in an official capacity."

15 U.S.C. § 35.

Congress enacted this statute prior to the Supreme Court's decision in *Hallie.* Its legislative history reflects the desire of Congress to broaden the shield protecting municipalities from antitrust claims for damages. The statute was enacted, in part, "in response to concern with Supreme Court decisions over the past few years that appear to have limited the extent that antitrust immunity applicable to States will be accorded to local govern-

ments." H.R. Rep. No. 98-965, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4602, 4603. Thus, it is fair to assume that Congress intended greater protection for municipalities than the parameters of the pre-*Hallie* state action doctrine provided.

Appellant argues, however, that, in the absence of an articulated state authorization for the town board members' conduct, appellees were not acting "in an official capacity," and therefore fall outside the protection of the court.

This narrow interpretation, which would provide no better protection than that which the federal common law afforded, is not what Congress intended.

The legislative history of the Act indicates that Congress, concerned with the number of antitrust actions brought against municipalities and the limited immunity available under the then-existing state action exemption, intended that the phrase "acting in an official capacity" be given broad meaning. An affirmative grant of authority is not required.

> "The definition of official local conduct is intended to be as broad as the local government's authority—encompassing 'legislative, regulatory, executive, administrative, or judicial authority' of a local government. The Committee assumes that this authority will most often stem from broad home rule grants, or from more specific State grants of authority to the local entity. The definition thus removes any requirement imposed by the Supreme Court in *Community Communications Co. v. City of Boulder*, [455 U.S. 389 (1978)] that there be a specific and affirmative grant of a State's authority to the local government in every instance."

H.R. Rep. No. 98-965, 98th Cong., 2d Sess. 20-21, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4602, 4621-22.

In light of the desire of Congress to grant broad immunity from damages for noncriminal acts by local officials and the authority which New York law grants to municipalities in the operation of local airports,[2] we believe that the district court was correct in holding that appellant failed to state a claim upon which relief can be granted under the Clayton Act for damages against the Town of East Hampton. The Act bars such a claim.

The Act, however, does not apply to claims for injunctive relief under the Sherman Act. *See* 15 U.S.C. § 35; H.R. Rep. No. 98-965, *supra, reprinted in* 1984 U.S. Code Cong. & Ad News 4602, 4603.

The question therefore of whether the court properly dismissed the instant claims must be examined in light of the Supreme Court's decision in *Hallie.* There, certain townships sought injunctive relief, alleging that the City of Eau Claire violated the Sherman Act by acquiring a monopoly over the provision of sewage treatment services and by tying such services to sewage collection and transportation services. In holding that the municipality was immune from such antitrust actions, the Court reexamined the line of cases which established the state action immunity doctrine. *Parker v. Brown,* 317 U.S. 341 (1943); *City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 (1978); *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982).

Hallie broadened the immunity available to municipalities. To be exempt from antitrust violations, municipalities must establish "that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.' " *Hallie, supra,* 105 S.Ct. at 1716 (quoting *City of Lafayette, supra,* 435 U.S. at 413). A municipality will be

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[2] *See* N.Y. Gen. Mun. Law §§ 350-357 (McKinney 1974 & Supp. 1984-85), referred to *infra.*

entitled to the protection of the state action exemption where it "demonstrate[s] that it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Hallie, supra,* 105 S.Ct. at 1717.

The *Hallie* Court, however, interpreted broadly a "clear articulation" requirement of state policy. It is not necessary for the state legislature to have stated explicitly that it expected a municipality to engage in conduct having anticompetitive effects. *Id.* at 1718. Rather, if the legislature " 'contemplated the kind of action complained of,' this is sufficient to satisfy the clear articulation requirement of the state action test." *Hallie, supra,* 105 S.Ct. at 1719 (quoting *City of Lafayette, supra,* 435 U.S. at 415). The Court also abandoned the requirement that, to be exempt, the state must supervise actively the municipality's activity. *Id.* at 1721.

In light of the Supreme Court's recent holding with respect to the immunity of municipalities from antitrust violations, we turn to the New York statutes which confer authority on municipalities to operate local airports. Under N.Y. Gen. Mun. Law §§ 350-357 (McKinney 1974 & Supp. 1984-85), the state legislature authorized local legislative bodies to establish, operate and maintain local airports, to acquire and lease real property, and to enter into exclusive and non-exclusive contracts. Specifically, § 352 provides that a town board operating a local airport may:

> "1. Construct, develop, improve, equip, maintain and operate the same.
>
> 2. Adopt regulations and establish fees or charges for the use thereof, and fix civil penalties for the violation of such regulations and provide for their enforcement.
>
> 3. Provide and charge for all services, concessions or other usual or incidental facilities rendered, conducted or maintained thereat.

4. Purchase and sell aviation petroleum products, aircraft accessories and parts, and provide and charge for the servicing and repairing of aircraft, and for all other services reasonably necessary or incidental to the operation of such airport or landing field.

5. Lease, or sub-lease the real property or lease, contract or otherwise agree, on an exclusive or non-exclusive basis, for the entire operation of such airport or landing field, or of any part thereof, or for the rendering of various services or the conduct of business activities, on or at said airport or landing field subject to the provisions of section three hundred fifty-two-a of this chapter; provided, however, that no such lease or contract shall be made until the governing body of the municipality shall have held a public hearing in respect thereto on at least ten days notice published in two newspapers having general circulation in the municipality, and provided further that any lease of an entire or portion of an airport or landing field, together with the facilities thereon, or contract for the operation of an airport or landing field or portion thereof shall be for a term not exceeding forty years and shall expressly provide that the said airport or landing field shall be used only for aviation purposes and for other purposes required for or necessary to the efficient and successful operation of an airport or landing field, upon such terms as shall require the operation of the same as a public airport or landing field for the general use of the public and for the benefit of such city, county, village or town. . . ."

N.Y. Gen. Mun. Law § 352 (McKinney 1974 & Supp. 1984-85). This delegation of authority declares a state policy that municipal airport operators may enter into exclusive lease arrangements. This effectively replaces competition with regulation. We therefore must assume that the New

York legislature contemplated the kind of anticompetitive activity in which the Town of East Hampton has engaged. In view of this broad statutory authority to enter into exclusive or non-exclusive contracts, it was a foreseeable result that the Town would assert the authority to deny appellant year-long operating rights. Such conduct is a foreseeable consequence of granting to municipalities the power to pursue either anticompetitive action or free-market competition in the area of airport services. The grant of this power is inconsistent with the "neutral . . . state policy." *Hallie, supra,* 105 S.Ct. at 1718. We hold that the *Hallie* state action test therefore was complied with in this case.[3]

Appellant also claims that the state action exemption of *Hallie* is not available because the Federal Aviation Act, 49 U.S.C. § 1305(a), has preempted state law in this area, leaving no state authorization for such anticompetitive activity despite the New York statutes. The provision of the Federal Aviation Act relied upon prohibits a political subdivision from enacting any law or rule "relating to rates, routes, or services of any air carrier. . . ." 49 U.S.C. § 1305(a)(1). This statute, however, explicitly provides that noting in the subsection referred to should be "construed to limit the authority of any State or political subdivision thereof . . . to exercise its proprietary powers and rights." 49 U.S.C. § 1305(b)(1). The relevant inquiry therefore is

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[3] Appellant relies on *Guthrie v. Genessee County Airport,* 494 F.Supp. 950, 955-57 (W.D.N.Y. 1980), where the court held that N.Y. Gen. Mun. Law § 350-57 did not meet the *City of Lafayette* state action test. We are not persuaded that *Guthrie* would be decided the same way after *Hallie. Guthrie* relied in part on the active state supervision requirement which the Supreme Court abandoned in *Hallie.* 494 F.Supp. at 956. *See Hallie, supra,* 105 S.Ct. at 1721. Moreover, the *Guthrie* court applied the then-existing state action test in holding that § 352 did not evince an "unambiguous intent on the part of the state legislature to replace competition with monopolistic public service." 494 F.Supp. at 956. After *Hallie,* the clear articulation test is not so restrictive.

whether the Town of East Hampton was exercising its proprietary rights as owner of the Airport when it refused to modify the ten-year lease to which the parties agreed in 1979.

We find no authority to support appellant's claim that the Town of East Hampton, as owner of the Airport, must allow appellant to serve as a fixed-base operator at the East Hampton Airport year-round. Nor do we find support for appellant's claim that the Town is compelled to lease to appellant the necessary equipment and services that would permit such year-round air service.[4] Absent such authority, the leases are valid exercises of the Town's proprietary rights granted under N.Y. Gen. Mun. Law § 352. The preemption statute, § 1305, reserves to the states and local government this power.

Having held that the Act and the state action doctrine bar the antitrust claims against the Town of East Hampton, there is no basis for holding that East Hampton Aire conspired with the Town to violate the antitrust laws. *E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority,* 362 F.2d 52, 56 (1 Cir.), *cert. denied,* 385 U.S. 947 (1966). *See Transport Limousine of Long Island v. Port Authority,* 571 F.Supp. 576 (E.D.N.Y. 1983).

We hold that the court properly dismissed the claims against EHA.

III.

Appellant also asserts that the court erred in dismissing its claims under the Federal Aviation Act. The court held

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[4] Since the state claims were dismissed with the federal claims, we do not address the issue of whether either party is in breach of contract for violation of the December 1979 lease. *United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966). Appellant claims, for example, that while the lease specifically requires that services be provided only between May 1 and September 30, its silence as to off-season services implies the authority to operate for that portion of the year also. Resolution of this issue is not dispositive of the federal claims.

that there is no private right of action under 49 U.S.C. §§ 1305(a), 1349(a). We agree.

To determine whether there is an implied private right of action under the statute, we apply the factors set forth in *Cort v. Ash,* 422 U.S. 66 (1975). Those factors are whether the plaintiff is a member of the class for whose benefit the statute was enacted; whether Congress intended to create a private right of action; whether a private right of action is consistent with the underlying purpose of the legislative scheme; and whether the matter is traditionally relegated to state law. 422 U.S. at 78. Although regulation of interstate air carrier activity traditionally has been a matter of federal law, congressional intent is the most significant of these factors. *Touche Ross & Co. v. Redington,* 442 U.S. 560, 579 (1979).

We agree with those courts which have decided after careful analysis that a private right of action is not available under § 1349(a). *E.g., Hill Aircraft & Leasing Corp. v. Fulton County,* 561 F. Supp. 667, 673 (N.D. Ga. 1982), *aff'd,* 729 F.2d 1467 (11 Cir. 1984); *Guthrie v. Genesee County Airport, supra,* 494 F. Supp. at 960. The statute provides in pertinent part that "[t]here shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal Funds have been expended." 49 U.S.C. § 1349(a).

The statute contains no explicit designation of fixed-base operators as beneficiaries. Rather, the law was enacted to benefit the general public as part of a statutory scheme to monitor the expenditure of federal funds. *Guthrie, supra,* 494 F. Supp. at 959-60. Moreover, as both the *Guthrie and Hill Aircraft* courts observed, the legislative history of § 1349(a) contains no suggestion that Congress intended to create an implied private right of action.

Section 1305(a) of the Federal Aviation Act is a preemption statute which establishes the federal government's sphere of power over the states in areas of interstate air

transportation. There is nothing to suggest that Congress intended to create an implied private right of action under that statute. *See* H.R. Rep. No. 95-1211, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Ad. News 3737, 3751-52 (statute designed to prevent uncertainties and conflicts where airlines provide both interstate and intrastate service resulting in different passenger fares).

Finally, appellant asserts that the court erred in dismissing its claim under § 1983. The comprehensive enforcement scheme provided in the Federal Aviation Act manifests congressional intent to foreclose an action under § 1983. *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 28 (1981); *Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1, 19 (1981). Appellant must look to the administrative agency responsible for the enforcement of these provisions. *Caceres Agency Inc. v. Trans World Airways,* 594 F.2d 932 (2d Cir. 1979).

We hold that the district court was correct in dismissing appellant's claims under the Federal Aviation Act and § 1983.

IV.

To summarize: The district court correctly held that the Local Government Antitrust Act of 1984 bars appellant's Clayton Act claims for damages. The broad delegation of authority which N.Y. Gen. Mun. Law §§ 350-357 confers on municipalities in the operation of local airports evidences an intent to displace competition with regulation. The state legislature must have contemplated the kind of anticompetitive conduct that would result. Under *Hallie,* this is sufficient to exempt the Town of East Hampton from both the Clayton and Sherman Act antitrust claims. Since Congress expressed no intent to create private rights of action under the Federal Aviation Act, the court prop-

erly dismissed the claims under the Federal Aviation Act and § 1983.

The injunction pending appeal is dissolved and the judgment of the district court is affirmed substantially for the reasons set forth in Judge Bramwell's opinions of May 28, 1985 and September 4, 1985.

Affirmed.

APPENDIX E

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 85-7752

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 27th day of March one thousand nine hundred and eighty-six

MONTAUK-CARIBBEAN AIRWAYS, INC., d/b/a LONG ISLAND AIRLINES,

Plaintiff-Appellant,

v.

JUDITH HOPE, RANDALL PARSONS, ANTHONY BULLOCK, MICHAEL J. FINAZZO, and HUGH KING, Individually and as the Town Board of the Town of East Hampton, CHARLES T. SMITH, RUSSELL STEIN, EAST HAMPTON AIRE, INC., and FRANK LA VIGNA,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant MONTAUK-CARIBBEAN AIRWAYS, INC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in

regular active service and to any judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
ELAINE B. GOLDSMITH
Clerk

APPENDIX F

US Department
of Transportation

Federal Aviation
Administration

January 12, 1984

Mr. Randall T. Parsons
Councilman
Town of East Hampton
159 Pantigo Road
East Hampton, New York 11937

Your inquiry of December 15, 1983, to Ms. Alkalay of our New York Regional Office was forwarded to my office for a reply. The questions you have raised are not susceptible to simple answers. Initially, I am certain you understand that while every situation may be factually unique, there are some applicable general concepts.

As a general proposition, the Town of East Hampton as an airport operator, which has received Federal funds, cannot grant exclusive rights or discriminate on economic grounds in its dealings with commercial operators or fixed base operators who wish to use the airport's facilities. To summarily or arbitrarily reject a proposal by an FBO to operate at the East Hampton Airport would violate these concepts which are established by Federal law and part of grant agreements between the FAA and the Town of East Hampton. However, East Hampton does have the right to establish reasonable rules and regulations applicable to all fixed base operators and to apply terms and non-discriminatory basis as well as negotiate the terms and conditions of an agreement or lease between itself and an FBO. In short, while an airport operator cannot summarily or arbitrarily reject a proposal by an FBO to operate at

its airport, at the same time a prospective FBO does not have the right to insist that access to a particular airport be unconditional or on terms and conditions it dictates.

Your second question concerns the effect of the Airline Deregulation Act of 1978 (P.L. 95-504). That Act does have a significant effect on every airport operator, including East Hampton, particularly with respect to the ability, or more precisely the inability, of an airport operator to use or apply economic factors in making decisions regarding use of its facilities by commercial operators. The Deregulation Act amended Section 102 of the Federal Aviation Act of 1958 to explicitly establish the concepts of competitive market forces and maximum reliance on those forces as the basis for commercial air service. [See 49 U.S.C. 1302] Additionally, that Act added section 105 to the Federal Aviation Act which expressly prohibits any State or local governmental body from enacting any law, rule, or regulation related to the rates, routes, or services of any air carrier authorized to operate pursuant to Title IV of the Federal Aviation Act. [See 49 U.S.C. 1305(a)]

I regret that we cannot be more explicit in responding to your questions but since we are not privy to all of the facts and circumstances involved in your specific situation, we must of necessity limit our response to the general concepts outline above. These concepts provide substantial but not unrestricted latitude to both airport operators and fixed base operators to negotiate the terms and conditions of an agreement regarding the use of airport facilities without injecting the Federal government into that process.

Sincerely,

/s/ J. E. MURDOCK III
J. E. MURDOCK III
Chief Counsel

APPENDIX G

US Department
of Transportation

Federal Aviation
Administration

Nov 21 1984

Russel S. Stein, Esq.
Town Attorney
Town of East Hampton
159 Pantigo Road
East Hampton, New York 11937

Dear Mr. Stein:

Complaint of Discrimination at East Hampton Airport

Our Airports Division has concluded its preliminary investigation of Montauk Caribbean Airlines d/b/a Long Island Airlines' complaint of discrimination at East Hampton Airport. As you know, Long Island Airlines alleges that the Town of East Hampton, the owner and operator of East Hampton Airport has refused, among other things, to allow it to operate at the airport on a year-round basis and claims that this refusal constitutes a violation of the grant agreement assurances and the Federal Aviation Act of 1958. Attached are copies of Long Island Airlines' allegations. Our preliminary investigation has focused primarily on the issue of Long Island Airlines' request to provide a year-round service as it is now being forced to cease operations. Our investigation into Long Island Airlines' other allegations is continuing.

Our investigation indicates that Long Island Airlines formally requested permission from the Town of East Hampton to operate on a year-round basis in December 1983. To date, the Town has failed to act on this request. While

our investigators have spoken with several people from the Town, we have been unable to discern any valid reasons for this inordinate delay. We, therefore, consider this delay to be tantamount to a denial of the request.

The Town is obligated by grant agreement with the FAA to operate the Airport "for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination." (Assurance 20, Grant Agreement dated September 29, 1983). It is also prohibited from granting an exclusive right to use of the airport by Section 308 of the Federal Aviation Act of 1958, 49 U.S.C. Section 1349.

We will be forced to conclude that the Town's refusal to grant Long Island Airlines permission to operate on a year-round basis is in violation of its grant agreements and the Federal Aviation Act unless the Town articulates nondiscriminatory reasons for its refusal. We would appreciate your response to Long Island Airlines' allegations within ten days. If we do not hear from you within that time, we shall have no choice but to conclude our investigation without the benefit of your response.

Sincerely,

/s/ THOMAS C. HALLORAN
THOMAS C. HALLORAN
Regional Counsel, AEA-7

APPENDIX H

US Department
of Transportation

Federal Aviation
Administration

January 7, 1985

Russell S. Stein, Esq.
Town of East Hampton
159 Pantigo Road
East Hampton, NY 11937

Dear Mr. Stein:

Montauk-Carribbean Airlines Lease

We have concluded our investigation of Montauk-Caribbean Airlines (MCA), Inc.'s allegation of discrimination at East Hampton Airport by reason of the Town of East Hampton's refusal of MCA's request to operate year-round. In reaching our conclusion, we have carefully considered MCA's allegations, as well as the Town's response, the history of correspondence between the parties and the results of our Airports Division investigation of this matter.

Based on our review, we have determined the facts to be as follows:

1. MCA presently has a ten-year lease to operate as an air taxi and a fixed base operator (FBO) at East Hampton Airport from May 1 through September 30. The lease term ends in December 1989. MCA has an option to renew the lease for an additional ten years at a rate to be agreed upon in 1989.

2. While the lease is a seasonal lease, it does require MCA to assume year-round operation in the event the present year-round FBO ceases to operate.

3. MCA has sought for more than one year to operate from October 1 through April 30 or, in other words, to operate year-round.

4. MCA formally requested permission to operate year-round in December 1983, by presenting to the Town an amendment to its current lease. The amendment would have provided for year-round operation effective on the date of signing.

5. MCA's proposed amendment was not executed by the Town.

6. By letter dated December 15, 1983, the Town offered MCA a year-round lease effective October *1985*, without any explanation of the reasons for their delay.

7. By letter dated January 24, 1984, MCA, through its attorney Stuyvesant Wainwright II, indicated that it was amenable to commencing year-round status on October 1, 1984. The letter also raised several other issues regarding the Town's offer which are not relevant to this investigation.

8. To date, the Town has refused to allow MCA to begin immediate year-round operations. In its response to MCA's allegations, the Town cites, among other things, MCA's failure to provide it with a draft lease, although it is clear that MCA did provide the Town with a draft amendment ot the lease. The Town also cites MCA's failure to halt operations in October 1984. This, however, cannot be construed as reasons for failing to approve the proposed lease amendments in the ten months preceding this date.

9. The Town has scheduled a public hearing for January 18, 1985, to determine whether a second year-round FBO is in the best interests of the Town and, if it is not, whether the Town can limit year-round fixed base operations cnsistent with federal law. The Town's decision to hold a public hearing, after offer-

ing MCA a year-round lease beginning in October 1985, can only be construed as another delaying attempt by the Town.

We conclude from these facts that the Town's refusal for more than one year to grant MCA permission to operate year-round without substantive reasons, is tantamount to granting the present year-round FBO an exlusive right from October 1 through April 30 and indicates that MCA is not being treated on fair and reasonable terms and without unjust discrimination. We believe this constitutes a violation of Section 308 of the Federal Aviation Act of 1958, 49 U.S.C. Section 1349, and a violation of Assurance 20 of the Town's grant agreements with the Federal Aviation Administration.

If the Town does not rectify this situation within thirty days, we will have no choice but to find the Town of East Hampton in non-compliance with its grant agreements.

Sincerely,

/s/ THOMAS C. HALLORAN
THOMAS C. HALLORAN
Regional Counsel

APPENDIX I

US Department
of Transportation

Federal Aviation
Administration

Apr 9 1985

Sanford M. Litvack, Esq.
Donovan, Leisure, Newton & Irvine
30 Rockerfeller Plaza
New York, New York 10112

Re: East Hampton—Montauk-Caribbean

Dear Mr. Litvack:

As I am sure you know, the Federal Aviation Administration has received a complaint by Montauk-Caribbean against the Town of East Hampton. The allegations contained in that complaint are both serious and significant in terms of Federal issues.

Recently, we have been provided with copies of various correspondence passing between you and Mr. Feigenbaum, counsel for Montauk-Caribbean, as well as copies of various newspaper accounts of public statements concerning this controversy. We see in those statements and in your letter of March 15, the potential for perhaps resolving at least one of the pending issues, specifically the ability of Montauk-Caribbean to obtain access to the East Hampton Airport in order to conduct its air carrier flight operational activities.

Your letter indicates that you view Montauk-Caribbean as having two separate and distinct roles, one as air carrier and one as a fixed base operator (FBO). In the former role, you indicate that "it is at best an open question as to whether your client [Montauk-Caribbean] was ever told

it could not operate as an air carrier (as opposed to an FBO) on a year-round basis." In the Southampton Press of January 24 Mr. Stein, the East Hampton Town Attorney, is reported to have indicated that the Town has no objection to Montauk-Caribbean providing year-round service to the airport.

If an accurate understanding of the position of the Town of East Hampton is that Montauk-Caribbean may operate at East Hampton as an air carrier with a right to provide all of the support services to itself (fueling, ground handling, baggage, counter space, etc.), we see no reason why Montauk-Caribbean could not start such service immediately. Your letter of March 15 indicated that before providing such service Montauk-Caribbean should provide the Town with its service plans, including proposed schedule, flight plans, equipment to be used and other relevant information following receipt of which the Town would be willing to meet with Montauk-Caribbean in an effort to resolve the issue. We would call your attention to Section 105 of the Federal Aviation Act of 1958, as ammended by the Airline Deregulation Act of 1978 [49 U.S.C. 1305]. The statute very clearly points out that no local political body such as a state or muncipality "shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." Since the Town of East Hampton is without authority to regulate the "rates, routes, or services of any air carrier," we do not understand the Town's need for information concerning Montauk-Caribbean's proposed schedule, flight plans, etc., as a prerequisite to "an effort to resolve the issue amicably." In fact, assuming the position of the Town vis-a-vis Montauk-Caribbean in its role as an air carrier is that they can operate at the East Hampton Airport on a year-round basis, we see no issue as to their initiation of such service.

If our assumption, or interpretation and understanding of your letter and the position of the Town is erroneous, we

would appreciate your advising us of that as soon as possible. In that circumstance, we would also appreciate your advising us of exactly what the Town's position is on this issue and the basis for that position.

We realize there is an extensive history to this controversy. We are interested in finding out if there is a way to effect a resolution of these issues. It appears to us that resolution of Montauk-Caribbean's rights to operate as an air carrier are resolvable easily and quickly. We recognize that the question of its right to serve East Hampton as an FBO, i.e., its offering of its ground-handling services to third parties, may not be as readily resolved. If the issue of Montauk-Caribbean's air carrier operations can be resolved, perhaps it may lead to further solutions, and the FAA is willing to assist in that process.

In order to prevent any misunderstanding or confusion, I have taken the liberty of sending a copy of this letter to Mr. Feigenbaum. From our perspective, we consider this letter to be a matter between counsel for the purpose of exploring the potential for resolving issues and, therefore, do not intend to get involved in any publicity or other public debate with respect to either our views and opinions or characterizing the views and opinions of either the Town or Montauk-Caribbean.

Sincerely,

/s/ J. E. MURDOCK III
J. E. MURDOCK III
Chief Counsel

cc: I. Leonard Feigenbaum, Esq.

APPENDIX J

U.S. CONSTITUTION ARTICLE VI

Clause 2. Supreme law.
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

15 USCS

§ 1. Trusts, etc., in restraint of trade illegal; penalty
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, § 1, 26 Stat. 209; Aug. 17, 1937, ch. 690, Title VII, § 1, 50 Stat. 693; July 7, 1955, ch. 281, 69 Stat. 282, Dec. 21, 1974, Pub. L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub. L. 94-145, § 2, 89 Stat. 801.)

§ 2. Monopolizing trade a felony; penalty
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred

thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch. 647, § 2, 26 Stat. 209; July 7, 1955, ch. 281, 69 Stat. 282; Dec. 21, 1974, P. L. 93-528, § 3, 88 Stat. 1708.)

§ 26. Injunctive relief for private parties; exception
Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this act [15 USCS §§ 13, 14, 18, and 19], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunctive improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven [49 USCS § 1 et seq.] in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. (Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.)

42 USCS

§ 1983. Civil action for deprivation of rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be sub-

jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

49 USCS

§ 1305 Federal preemption

(a) Preemption. (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act [49 USCS §§ 1371 et seq.] to provide interstate air transportation.

(2) Except with respect to air transportation (other than charter air transportation) provided pursuant to a certificate issued by the Board under section 401 of this Act [49 USCS § 1371], the provisions of paragraph (1) of this subsection shall not apply to any transportation by air of persons, property, or mail conducted wholly within the State of Alaska.

(b) Proprietary powers and rights. (1) Nothing in subsection (1) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to

exercise its proprietary powers and rights.

(2) Any aircraft operated between points in the same State (other than the State of Hawaii) which in the course of such operation crosses a boundary between two States, or between the United States and any other country, or between a State and the beginning of the territorial waters of the United States, shall not, by reason of crossing such boundary, be considered to be operating in interstate or overseas air transportation.

(c) Existing State authority. When any intrastate air carrier which on August 1, 1977, was operating primarily in intrastate air transportation regulated by a State receives the authority to provide interstate air transportation, any authority received from such State shall be considered to be part of its authority to provide air transportation received from the Board under title IV of this Act [49 USC §§ 1371 et seq.], until modified, suspended, amended, or terminated as provided under such title.

(d) Definition. For purposes of this section, the term "State" means any State, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the Virgin Islands, and any territory or possession of the United States.

Aug. 23, 1958. P. L. 85-726, Title I, § 105, as added Oct. 24, 1978, P.L. 95-504, § 4(a), 92 Stat. 1708.)

§ 1359. Solicitation of funds and distribution of literature; regulations.

(a) The Administrator of the Federal Aviation Administration (hereinafter referred to as the "Administrator") shall, within 90 days after the date of enactment of this Act [enacted Feb. 15, 1980], promulgate regulations for airports operated by the Administration to regulate the access to public areas by individuals or by religious and nonprofit organizations (as defined in section 501(c)(3) of the Internal Revenue Code of 1954) [26 USCS § 501(c)(3)] for the purpose of soliciting funds or distributing materials.

(b) In promulgating regulations under this section the Administrator shall consider requiring any individual or organization described in subsection (a) to submit an application for a permit to engage in the soliciting of funds or the distribution of materials. In considering such an application the Administrator may require that—

(1) a responsible individual representative of the applicant shall be designated to represent the organization.

(2) each individual participating in any solicitation or distribution will display a proper identification approved by the Administrator,

(3) the number of individuals engaged in any solicitation or distribution at any one time shall not exceed a reasonable number, in keeping with the need for free movement in and operation of the airports as provided for by the permit,

(4) the solicitation or distribution be confined to limited areas and times, and

(5) no individual or organization which holds a permit under this section shall be permitted to—

(A) use sound amplification or display signs (other than signs approved by the Administrator);

(B) intentionally interfere with users of the airport;

(C) engage in the use of indecent or obscene remarks or conduct;

(D) engage in the use of loud, threatening, or abusive language intended to coerce, intimidate or disturb the peace.

(c)(1) The Administrator shall consider requiring that a copy of a permit (if such is required) be conspicuously posted in the area in which any solicitation or distribution is permitted.

(2) The Administrator shall consider whether revocation of approval for any permit if required and approved under this section should occur for any violation of any rule or regulation promulgated hereunder.

(d) Regulations intended to be promulgated under this section shall be submitted to Congress within 30 days after the date of enactment of this Act [enacted Feb. 18, 1980].

(Feb. 15, 1980, P. L. 96-193, Title V, § 501, 94 Stat. 58.)

§ 1506. Remedies not exclusive.

Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

(Aug. 23, 1958, P. L. 85-726, Title XI, § 1106, 72 Stat. 798).

§ 2210. Project sponsorship

(a) Sponsorship. As a condition precedent to approval of an airport development project contained in a project grant application submitted under this title, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination, including the requirement that (A) each air carrier using such airport (whether as a tenant, nontenant, or subtenant of another air carrier tenant) shall be subject to such nondiscrimination and substantially comparable rates, fees, rentals, and other charges and such nondiscriminatory and substantially comparable rules, regulations, and conditions as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities, subject to reasonable classification such as tenants or nontenants, and combined passenger and cargo flights or all cargo flights, and such classification or status as tenant

shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on tenant air carriers, and (B) each fixed-based operator at any airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport utilizing the same or similar facilities, and (C) each air carrier using such airport shall have the service itself or to use any fixed-based operator that is authorized by the airport or permitted by the airport to serve any air carrier at such airport;

(2) there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, the providing of services at an airport by a single fixed-based operator shall not be construed as an exclusive right if if would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and if allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport;

(3) the airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

(4) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

(5) appropriate action, including the adoptions of zoning laws has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes

compatible with normal airport operations, including landing and takeoff of aircraft;

(6) all of the facilities of the airport developed with Federal financial assistance and all those usable for landing and takeoff of aircraft will be available to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, charge may be made for a reasonable share, proportion to such use, of the cost of operating and maintaining the facilities used;

(7) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control or navigation activities, or weather-reporting and communication activities related to air traffic control, any areas of land or water, or estate therein, or rights in buildings of the sponsor as the Secretary considers necessary or desirable for construction at Federal expense of space or facilities for such purposes;

(8) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Secretary after consultation with appropriate public agencies;

(9) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection, except that no part of the Federal share of an airport development or airport planning project for which a grant is made under this title or under the Federal Airport Act or the Airport and Airway Development Act of 1970 shall be included in the rate base

in establishing fees, rates, and charges for users of that airport;

(10) the airport operator or owner will submit to the Secretary such annual or special airport financial and operations reports as the Secretary may reasonably request;

(11) the airport and all airport records will be available for inspection by any duly authorized agent of the Secretary upon reasonable request;

(12) all revenues generated by the airport, if it is a public airport, will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned or operated by the owner or operator of the airport and directly related to the actual transportation of passengers or property: Provided, however, that if covenants or assurances in debt obligations previously issued by the owner or operator of the airport, or provisions in governing statutes controling the owner or operator's financing, provide for the use of the revenues from any of the airport owner or operator's facilities, including the airport, to support not only the airport but also the airport owner or operator's general debt obligations or other facilities, then this limitation on the use of all other revenues generated by the airport shall not apply; and

(13) the airport operator or owner who receives a grant for the purchase of land for noise compatibility purposes which is conditioned on the disposal of the acquired land at the earliest practicable time will, subject to the retention or reservation of any interest or right therein necessary to insure that such land is used only for purposes which are compatible with the noise levels of the operation of the airport, use its best efforts to so dispose of such land. The proceeds of such disposition shall be (A) refunded to the United States for the Trust Fund on a basis proportionate to the United State share of

the cost of acquisition of such land, or (B) reinvested in an approved project, pursuant to such regulations as the Secretary shall prescribe.

(b) Compliance. To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this title, as the Secretary considers necessary. Among other steps to insure such compliance, the Secretary is authorized to enter into contracts with public agencies on behalf of the United States. Whenever the Secretary obtains from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and constructs space or facilities thereon at Federal expense, the Secretary is authorized to relieve the sponsor from any contractual obligation entered into under this title, the Airport and Airway Development Act of 1970, or the Federal Airport Act to provide free space in airport buildings to the Federal Government to the extent the Secretary finds that space no longer required for the purposes set forth in paragraph (7) of subsection (a) of this section.

(c) Consultation. In making a decision to undertake any airport development project under this title, each sponsor of an airport shall undertake reasonable consultations with affected parties using the airport at which such project is proposed.

(Sept. 3, 1982, P. L. 97-248, Title V, § 511, 96 Stat. 686.)

N.Y. Gen. Mun. Law § 352

(McKinney 1974 & Supp. 1984-85)

"1. Construct, develop, improve, equip, maintain and operate the same.

2. Adopt regulations and establish fees or charges for the use thereof, and fix civil penalties for the violation of such regulations and provide for their enforcement.

3. Provide and charge for all services, concessions or other usual or incidental facilities rendered, conducted or maintained thereat.

4. Purchase and sell aviation petroleum products, aircraft accessories and parts, and provide and charge for the servicing and repairing of aircraft, and for all other services reasonably necessary or incidental to the operation of such airport or landing field.

5. Lease, or sub-lease the real property or lease, contract or otherwise agree, on an exclusive or non-exclusive basis, for the entire operation of such airport or landing field, or of any part thereof, or for the rendering of various services or the conduct of business activities, on or at said airport or landing field subject to the provisions of section three hundred fifty-two-a of this chapter; provided, however, that no such lease or contract shall be made until the governing body of the municipality shall have held a public hearing in respect thereto on at least ten days notice published in two newspapers having general circulation in the municipality, and provided further that any lease of an entire or portion of an airport or landing field, together with the facilities thereon, or contract for the operation of an airport or landing field or portion thereof shall be for a term not exceeding forty years and shall expressly provide that the said airport or landing field shall be used only for aviation purposes and for other purposes required for or necessary to the efficient and successful operation of an airport or landing field, upon such terms as shall require the operation of the same as a public airport or landing field for the general use of the public and for the benefit of such city, county, village or town. . . .